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MICHAEL ROBAK, JR.,

SINGLE APPENDIX

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON

and

THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF WASHINGTON

AUGUST 1, 1972
JURISDICTIONAL STATEMENT FILED FEBRUARY 12, 1972
PROBABLE JURISDICTION NOTED JUNE 12, 1972

CRAFTSMAN ◆ KEY PRESS ◆ SEATTLE, WASHINGTON

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LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON

and

THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

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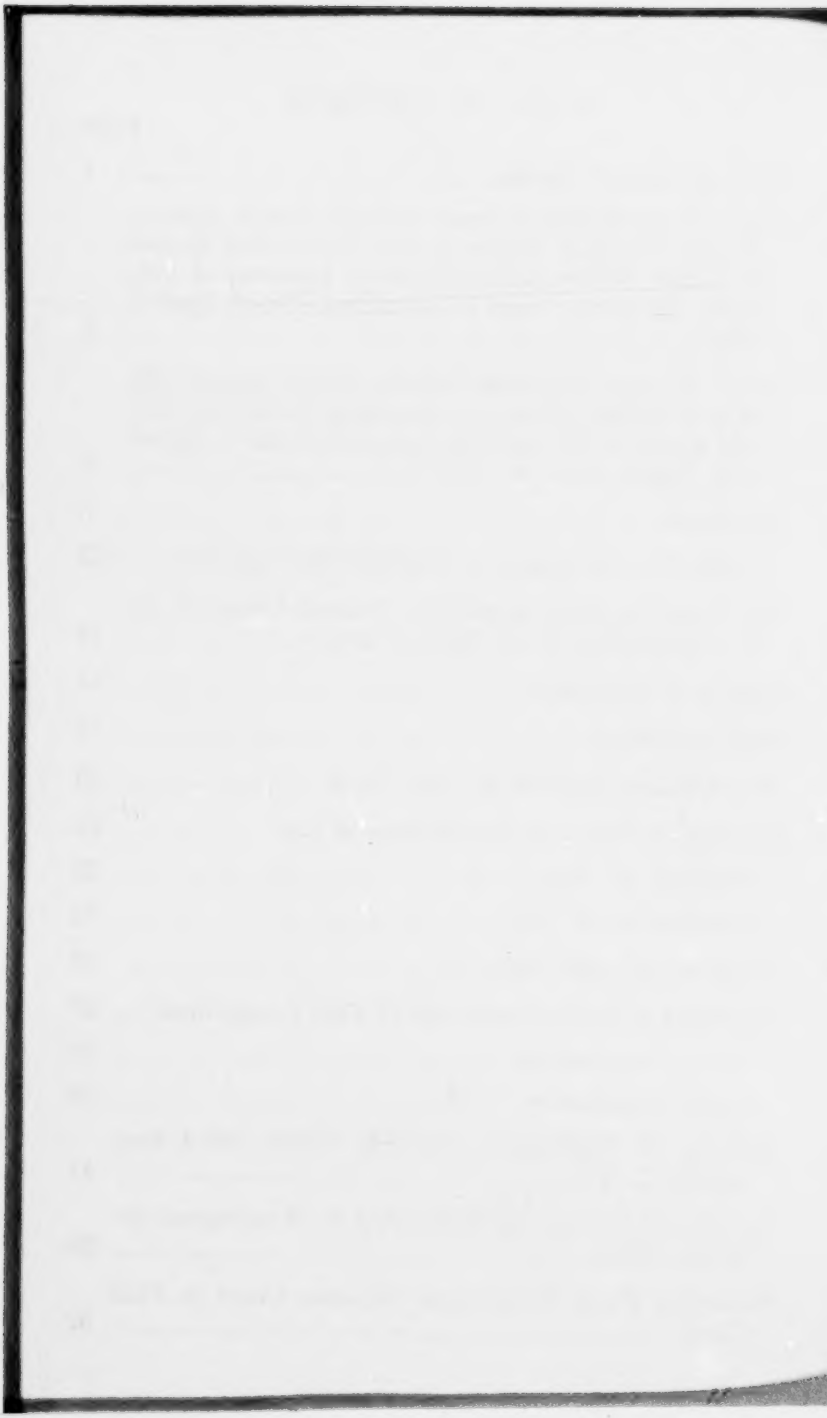

RELEVANT DOCKET ENTRIES

Title of Case:

LEONARD TONASKET
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

Date	Proceedings	Single Appendix Page No.
1967		
March 8	Complaint filed.	6
July 10	Stipulation striking plaintiff's second cause of action regarding retail sales of liquor filed.	14
Aug. 23	Answer of defendant State of Washington filed.	14
Aug. 28	Reply to defendants' answer filed.	18
1968		
Oct. 7	Memorandum Opinion of trial court filed upholding application of state excise taxes to retail sales on the Colville Indian Reservation.	19
1969		
Jan. 21	Findings of Fact and Conclusions of Law of trial court filed.	22
Jan. 21	Judgment of trial court filed upholding application of state excise taxes to retail sales on the Colville Indian Reservation.	26
Jan. 23	Notice of Appeal to Washington Supreme Court filed.	Not included

Date	Proceedings	Single Appendix Page No.
1971		
Sept. 2	Washington Supreme Court rendered its opinion upholding application of state excise taxes to retail sales on the Colville Indian Reservation.	41
Oct. 4	Petition for Rehearing by Washington Supreme Court filed.	55
Nov. 15	Remittitur issued by the Washington Supreme Court making the Judgment of the Washington Supreme Court final as of November 15, 1971.	57
Dec. 10	Notice of Appeal to the United States Supreme Court filed.	Not included
1972		
Feb. 12	Jurisdictional Statement filed with the United States Supreme Court.	Not included
June 12	Probable Jurisdiction noted by United States Supreme Court.	Not included

LETTER FROM SUPERINTENDENT, COLVILLE INDIAN AGENCY, BUREAU OF INDIAN AFFAIRS, TO AREA DIRECTOR OF BUREAU OF INDIAN AFFAIRS ASKING FEDERAL APPROVAL OF CIGARETTE INVENTORY LOAN TO APPELLANT, DATED APRIL 9, 1964.

Credit
240.4

Colville Indian Agency
Coulee Dam, Washington

April 9, 1964

Mr. Robert D. Holtz, Area Director
Portland, Oregon
Attention: Branch of Credit

Dear Mr. Holtz:

Attached is a loan application from Leonard Tonasket for $1,000.00 to build up his inventory in a store which he is leasing in East Omak. The Credit Committee recommended approval of the loan in the amount of $800.00, and since this is a minor change we did not revise the financial statement and estimated income and expenses accordingly.

The Tonaskets had a loan on a store in Grand Coulee but because of the low net income they quit operating the store and tried to sell their inventory and equipment. Some of the equipment they have moved to the store in East Omak. Their primary income from the store in Omak is from the sale of cigarettes since they are located on trust land and able to sell cigarettes tax free. The Tonaskets have operated this business for five weeks and have shown

a good profit but they have run out of cigarettes each week because they are not able to stock a sufficient quantity to meet the demand.

The original loan was secured by a mortgage on Mr. Tonasket's allotment, a copy of which is attached, and unless a new mortgage is required we will consider this mortgage as security for this loan. Approval of the loan is recommended.

Sincerely yours,

Superintendent

Attachments

I certify that this is a true copy of official Bureau of Indian Affairs records in my custody.

s/ W. SHERWIN BROADHEAD

Date: 5-22-71

Certifying Officer

LETTER OF LOAN SPECIALIST, COLVILLE INDIAN AGENCY, BUREAU OF INDIAN AFFAIRS, TO APPELLANT INDICATING FEDERAL APPROVAL OF CIGARETTE INVENTORY LOAN TO APPELLANT, DATED APRIL 16, 1964.

Credit
240.4

Colville Tribal Credit Office
Nespelem, Washington

April 16, 1964

Mr. Leonard Tonasket
Omak Washington

Dear Mr. Tonasket:

We have received approval of your loan application for an additional $800.00 provided that a new mortgage be taken on allotment S-2026. We have prepared a new note with the first payment being due June 1, rather than May 1, since the mortgage will have to be approved before we can advance funds. Enclosed is a promissory note and mortgage for you and your wife to sign. Please have all three copies of the mortgage notarized and return these documents to this office as soon as possible.

Sincerely yours,

Arthur E. Kalmen
Loan Specialist

Enclosures

I certify that this is a true copy of official Bureau of Indian Affairs records in my custody.

s/ W. Sherwin Broadhead
Certifying Officer

Date: 5-22-71

COMPLAINT

(Title omitted in printing)

Comes now the Plaintiff, and for cause of action against the Defendants alleges as follows, to-wit:

I.

That the Plaintiff is now, and was at all times herein mentioned, a full blooded Indian, and a duly enrolled member of the Confederated Tribes of the Colville Indian Reservation. This Paragraph shall apply as to all causes of actions set forth herein.

II.

That at all times herein mentioned, and this applies to all causes of actions set forth herein, the Confederated Tribes of the Colville Indian Reservation have not been terminated by the United States of America, and are still in a trust status.

III.

That at all times herein mentioned, including all causes of actions herein set forth, the Plaintiff is and was a ward of the Government of the United States of America as a result of his being an Indian and member of the Confederated Tribes of the Colville Indian Reservation.

IV.

That at all times herein mentioned, the Plaintiff did operate a retail business, of selling cigarettes, on lands, the same being allotted lands, held in trust by the United States of America.

V.

That the State of Washington, by and through their agents, including the Supervisor of the Washington State

Tax Commission, have harassed and confiscated retail merchandise, including cigarettes, in an amount as set forth in the Inventory attached herewith, and by reference incorporated herein, as though set forth in full, marked Exhibit "A".

VI.

That the acts aforesaid did occur on or about the 9th day of February, 1967, and/or the 10th day of February, 1967. In addition to the foregoing the State of Washington did charge the said Plaintiff under Information, Okanogan County Cause No. 05284 with four (4) counts of violating Registration requirements of the Tax Commission of the State of Washington, failing to have proper stamps on cigarettes in accordance with RCW 82.24.050 and 82.24.110, further Engaged in the Business of Selling Cigarettes without first having obtained a License to do so as provided in RCW 19.91.120 and RCW 19.91.170, and was Selling Cigarettes without a stamp affixed on every package thereof as required under RCW 82.24.050 and RCW 82.24.110.

VII.

That in addition to the foregoing charges the agents of the State of Washington have instructed the Plaintiff not to sell cigarettes to any White person on the lands as aforesaid described under the penalty of further criminal charges being filed.

VIII.

That the Plaintiff has no plain, adequate and speedy remedy at law.

IX.

That unless the State of Washington, and the Super-

visor of the Washington State Tax Commission are enjoined from further interference of the Plaintiff in the operation of selling retail, including the selling of cigarettes, without registering or affixing stamps thereon, including the filing of criminal charges, it is going to compel the Plaintiff to cease operation of business in the retail selling of cigarettes and other items of merchandise unto those not of the Indian race.

X.

That the State of Washington, by and through its agents, the Washington State Tax Commission promulgated rules and regulations setting forth that the Indians had rights that allotted Indians who are wards of the United States of America, conducting business within the confines of an Indian Reservation or on allotted lands had the right to sell items at retail without being licensed by the State of Washington or paying any tax thereto, including, but not limited to, cigarettes. That the State of Washington and the Tax Commission are estopped to assert any rights to tax or confiscate items as aforesaid under the laws of the State of Washington.

By way of Second cause of action the Plaintiff alleges as follows, to-wit:

I.

That the Plaintiff re-alleges all of the allegations in the First cause of action relative to his status as an Indian and the status of the property upon which he conducts his business.

II.

That the Plaintiff has made application, and will be granted, a retail Liquor License. That the Plaintiff has

been advised by agents of the State of Washington that he is not authorized to conduct the business of selling by retail Liquor by the bottle, including wine, beer, and hard liquor of other varieties, unless legally licensed; that in fact the State will not legal license any person to sell hard liquor of other varieties by the bottle; that under the Plaintiff's status as an Indian and the status of the land upon which he conducts his business he is authorized, as long as he is licensed by the United States of America, to so conduct a business.

III.

That unless the State of Washington is so enjoined they will interfere and prevent the said Plaintiff from operating said business and will file criminal charges against him for violating the laws of the State of Washington.

IV.

That the Plaintiff has no adequate and speedy remedy at law.

V.

That unless the State of Washington is enjoined from interfering in the operation of said business of selling liquor by retail, including hard liquor by bottle of other varieties, or in the alternative that a declaratory Judgment is entered declaring that the Plaintiff is entitled to sell liquor as aforesaid, it will work an extreme hardship and disability upon the said Plaintiff.

VI.

That in the event the Court would consider an action for declaratory Judgment under this cause of action it would be of a beneficial nature to both the State of Washington and the Indians who are allotted and wards of the

United States of America, and who operate businesses within the confines of an Indian Reservation or on allotted Indian land.

By way of a Third cause of action the Plaintiff alleges as follows, to-wit:

I.

Plaintiff re-alleges all Paragraphs relative to his status as to an Indian and the premises upon which he conducts his business.

II.

That in addition to the business activities in the foregoing two causes of actions the Plaintiff intends and desires to enter into a retail business on the aforesaid premises including but not limited to, all articles of merchandise, wearing apparel and appliances.

III.

That your Plaintiff verily believes that unless he registers with the State of Washington, and obtains a Certificate of Registration from the Tax Commission as required by the laws of the State under RCW 82.32.030 and RCW 82.32.290, and collects retail Sales Tax under the laws of the State of Washington that he will be harassed and interfered with by the State of Washington and specifically by the agents of the Supervisor of the Washington State Tax Commission.

IV.

That the Plaintiff has no adequate and speedy remedy at law.

V.

That under the foregoing circumstances the Court should enter a declaratory Judgment setting forth the rights and status of the Plaintiff as to what requirements he is required to operate under as to the laws of the State of Washington relative to doing business, affixing tax stamps, collecting and remitting retail Sales Tax.

WHEREFORE, Plaintiff prays for Judgment against the Defendants as follows, to-wit:

1. On Plaintiff's first cause of action that the Court permanently enjoin the Defendants from interfering, taxing, harassing, or in any way preventing the Plaintiff, whether through criminal charges or otherwise, from operating the retail business of selling cigarettes in and on the premises, whether to Indian or non-Indian, as set forth in this Complaint; Plaintiff further prays that the Court enter an Order directing the Defendants to return all cigarettes confiscated as set forth in Exhibit "A", or in the alternative to reimburse them for the market value thereof.

2. Plaintiff prays on second cause of action that the Court enter an Order enjoining the Defendants from interfering with the Plaintiff's operation of selling liquor by retail, including hard liquor by bottle of other varieties, or in the alternative that the Court enter a declaratory Judgment declaring that the Plaintiff is entitled to sell liquor as set forth in the within and foregoing Complaint.

3. In the Third cause of action Plaintiff prays that the Court enter a declaratory Judgment setting forth and spelling out the rights and status of the Plaintiff as to what requirements, if any, he is required to operate under as to

the laws of the State of Washington relative to doing business, affixing tax stamps, regardless of nature and collecting and remitting Sales Tax.

4. In addition to the foregoing the Plaintiff prays for such other and further relief as to the Court may deem just, equitable and proper, and for Plaintiff's costs and disbursements incurred herein.

HANCOCK & KOHLS
By: s/ B. E. Kohls

Attorneys for Plaintiff

(Verification omitted in printing)

13

EXHIBIT A

FL 218
Rev. 2/15/66

TAX COMMISSION OF THE STATE OF WASHINGTON

INVENTORY OF CONFISCATED CIGARETTES

Date of Confiscation Feb. 10, 1967

Name Leonard Tonasket

Address _____ City Omak, Wash.

Brand	No. Cartons	Brand	No. Cartons
Alpine	6, Menthol 4	Melachrino	
Avalon		Montclair	19
Bel Air	23	Murad	
Benson & Hedges		Newport	27
Brandon		Oasis	
Camel	29, 5, Filter	Old Gold	20 Kings, 12 Reg 14 Filter 5
Carlton	9	Pall Mall	5 - 13 Filter
Cavalier		Parliaments	6
Chesterfield	22 Reg, Menthol 1, Filter 8	Paxton	
Devon		Philip Morris	10 Reg, 19 Kings, 30 Filter 5 Ment
Domino	39 Filter, 46 Plain, 1 plain 9 Filt.	Raleighs	5 plain, 11 Filter 8 plain 3 Filter
Duke		Rameses	
Du Maurier		Regents	
Dunhill		Salem	19
Embassy		Sano	
Fatimas		Spring	20, 1
Galaxy	20	Spud	
Half & Half		Sweet Caporal	
Holiday		Tareyton	2
Hit Parade		Tempo	6, 1
Kent	20, 10	Tennyson	4
Kools	35 11 Filter	Viceroy	14
Lark	12, 4	Wings	9
Life		Vogue	
L & M	13, Kings 7, 5,	Winston	9
Lucky Strike	17, 12, Filter 7, Menth 10	York	15
Mapleton		Lucky Filter	19
Marlboro	18, 5, 14,	Herbert Tareyton	10
Marvels		Half & Half	15, 4
Masterpiece		Philip Morris Filters	--10 Menthol
Prince Albert	- 8	Yukon	14
True Menthol	- 5	Waterford	6
True	18		
Frappe	- 2		
	Total		Total

Total 1st. Column _____

Total Confiscated _____

By /s/ Cal Wilson
Agent

MISCELLANEOUS TAX SECTION
CIGARETTE TAX DIVISION

STIPULATION STRIKING APPELLANT'S SECOND CAUSE OF ACTION REGARDING RETAIL SALES OF LIQUOR.

(Title omitted in printing)

Comes now both the Plaintiff and the Defendants, and herewith stipulate, by and through their respective counsel, that the Plaintiff's second cause of action be stricken from the Complaint and further that Paragraph II. of Plaintiff's prayer likewise be stricken.

Dated this 10th day of July, 1967.

(Signatures omitted in printing)

ANSWER TO COMPLAINT

(Title omitted in printing)

COMES NOW the State of Washington, defendant above named, by John J. O'Connell, Attorney General, and J. Richard Duggan, Assistant Attorney General, and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

For answer to paragraphs I, II, and III of the plaintiff's first cause of action, defendant lacks knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

II.

For answer to paragraph IV of the plaintiff's first cause of action, defendant State of Washington admits that plaintiff did operate a retail business which included the sale of cigarettes, but lacks knowledge or information sufficient to form a belief as to the truth of all other allegations contained therein and therefore denies the same.

III.

For answer to paragraph V of the plaintiff's first cause of action, defendant admits that its agents did participate in the seizure of the cigarettes listed in the inventory, a copy of which is marked Exhibit "A" and attached to the complaint, but denies all other allegations contained therein.

IV.

For answer to paragraph VI of the plaintiff's first cause of action, defendant admits that the seizure of the cigarettes indicated on the plaintiff's Exhibit "A" took place on February 10, 1967, and that plaintiff has been charged with one count each of the crimes of engaging in business without a valid registration certificate, of engaging in the business of selling cigarettes without a valid license to do so, of having cigarettes in possession without the proper stamps affixed thereto, and of selling cigarettes without the proper stamps affixed thereto, but denies all other allegations contained therein.

V.

For answer to paragraphs VII, VIII, IX and X of the plaintiff's first cause of action, defendant admits that it has adopted and promulgated its Rule 192, a copy of which is marked Exhibit "A" attached hereto, and by reference incorporated herein, but specifically denies each and every other allegation contained therein.

VI.

For answer to paragraph I of plaintiff's third cause of action defendant hereby denies or admits the allegations contained in the paragraphs referred to in the complaint in the same manner and to the same extent as in the appropriate foregoing paragraphs of this Answer.

VII.

For answer to paragraphs II and III and plaintiff's third cause of action, defendant lacks knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same.

VIII.

For answer to paragraphs IV and V of plaintiff's third cause of action defendant specifically denies each and every allegation contained therein.

For affirmative defenses, defendant alleges as follows:

I.

That at all times herein mentioned defendant State of Washington was and now is one of the sovereign states of the United States of America and is entitled to defend this action.

II.

That the defendant is vested with authority to adopt and enforce legislation for the government of the territory within its boundaries.

III.

That the defendant has, in the exercise of this authority, adopted legislation declaring certain acts and series of acts to be felonies, gross misdemeanors or misdemeanors, which acts and series of acts are by reason of such declaration crimes against the State of Washington when performed within the boundaries of said state.

IV.

That this legislation defining crimes against the State of Washington applies to the acts or series of acts falling within such definitions performed by any person, regard-

less of race, creed or national origin, in any part of this state not specifically removed from the jurisdiction of this state by supervening legal authority.

V.

That the plaintiff is not, at any time or under any circumstances mentioned in this action, excused from the duty of compliance with the legislation of this state defining crimes.

WHEREFORE, defendant demands judgment against plaintiff as follows:

1. That on plaintiff's third cause of action, the court enter its declaratory judgment to the effect that in the conduct of a business on the Colville Indian Reservation, the plaintiff is subject to the legislation of the state of Washington defining crimes.

2. That the plaintiff take nothing by way of its first cause of action, and that his requests for an injunction and for an order to return cigarettes be denied.

3. That the defendant be awarded costs, fees and disbursements, and such other and further relief as may seem to the court just and equitable in the premises.

DATED at Olympia, Washington, this 21st day of August, 1967.

(Signatures omitted in printing)

REPLY TO ANSWER

(Title omitted in printing)

Comes now the Plaintiff above named, by and through his attorneys of record, Hancock & Kohls, B. E. Kohls of Counsel and for reply to Defendants' Affirmative defense admits, alleges and denies as follows, to-wit:

I.

For reply to the Defendants' affirmative defenses paragraphs I. through V. the Plaintiff denies each and every allegation, matter and thing therein contained inconsistent with the Plaintiff's complaint.

WHEREFORE, Plaintiff prays for relief originally sought in his Complaint.

Dated at Omak, Washington this ..... day of August, 1967.

(Signatures omitted in printing)

MEMORANDUM OPINION OF TRIAL COURT

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

LEONARD TONASKET, *Plaintiff,* vs. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Defendants.*	No. 38791 MEMORANDUM OPINION

This matter came on for trial with the Plaintiff seeking a declaratory judgment as against the state of Washington and the Tax Commission and seeking to enjoin the state of Washington from interferring with the Plaintiff in the selling of cigarettes at retail. The Plaintiff was represented by his attorney, Mr. B. E. Kohls and the defendant was represented by its attorney, Mr. J. Richard Duggan, Assistant Attorney General. After taking testimony and hearing the arguments of counsel, and receiving briefs of the parties, the Court took the matter under advisement. Subsequently, it was called to the attention of the Court that an opinion has been rendered by the supreme court in the case of the *Makah Indian Tribe v. Clallam County,* 73 Wn. 2d 683. The Court called this matter to the attention of counsel as to whether they wished to submit additional briefs. Additional briefs were submitted. The Court has considered the testimony, the arguments and the briefs.

The Court does not feel that there is any necessity of reiterating the facts in this case as there appears to be no conflict or dispute as to the facts and the Court is satisfied that the Plaintiff is a member of the Colville Confederated

Tribes. The Plaintiff has gone to great lengths in arguing and submitting his briefs to cover the law relating to taxation of Indians on Indian reservations and cites the leading case of *Warren Trading Post Co. v. Arizona Tax Commission*, 1965 Arizona, 85 S.Ct. 1242, 380 U.S. 685, 14 L. ed 2d 165, in which the Supreme Court of the United States held that under the commerce clause of the United States Constitution, being Article I, Section 8, Clause 3, Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders in the form of taxes. The Plaintiff further cites the case of *Makah Indian Tribe v. Tax Commission*, 72 Wn. 2d 608 and also *Makah Indian Tribe v. Clallam County*, 73 Wn. 2d 683 as additional authorities.

The Court is familiar with *Makah Indian Tribe v. Tax Commission*, supra, in that this Court was the judge originally hearing that case.

While these cases undoubtedly point out the law governing in those situations, there is one additional fact found here that must be taken into consideration by the Court and that is that the Colville Confederated Tribes of the state of Washington have accepted the civil and criminal jurisdiction of the state of Washington under the provisions of Chapter 37.12 RCW and under the provisions of Public Law 280, 83rd Congress and the actual question for the Court to determine, is whether the United States government under the provisions of Public Law 280 of the 83rd Congress has relinquished to the states the right to impose the excise taxes as to the sale of cigarettes and has taken away from the Indians protection granted them un-

der the *Warren Trading Post Co. v. Arizona Tax Commission* case, supra.

In examining the legislation of the state of Washington, implementing Public Law 280 of the 83rd Congress, the Court finds that in RCW 37.12.060 limitations on the application of the acceptance of civil and criminal jurisdiction of the Indian tribes were laid out in detail and actually is verbatim the limitations set down by Public Law 280 of the 83rd Congress and the Court doesn't find in these statutes any direct limitation on the imposition of an excise tax as complained of herein. RCW 37.12.060 provides that there shall be no taxation of any real or personal property, including water rights and tide lands, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or subject to restriction against alienation imposed by the United States. The Court is satisfied, as argued by the Defendant, that if it was not intended to transfer the power to tax to the state, there would have been no necessity of mentioning the term "taxation" within the exclusionary provision of RCW 37.-12.060 and Public Law 280, supra. The Court is of the opinion that the taxation which had been imposed by the state in this case, has not been limited by the provisions of RCW 37.12.060 or by 28 USCA 1360 in sub-section (b) thereof.

In conclusion, the Court is of the opinion that, while the law as cited by the Plaintiff is controlling as to those Indian tribes which have not allowed the assumption of criminal and civil jurisdiction by the state of Washington, in those cases where civil and criminal jurisdiction has been accepted by the state of Washington, the members of the Indian tribes therein are subject to the excise taxes

complained of by the Plaintiff herein and the state *may further enforce the criminal laws of the state relating to the possession of unstamped cigarettes.*

The Plaintiff has further asked for declaratory judgment enjoining the state and requesting a restraining order against the state interfering with the possible potential sale by the Plaintiff of intoxicating liquor and the Court sees no reason why the opinion of the Court should not apply equally as well to the sale of intoxicating liquor.

The Court will sign Findings of Fact, Conclusions of Law and Judgment in accordance with the terms of this memorandum opinion.

DATED this 7th day of October, 1968.

s/ HEWITT A. HENRY
Hewitt A. Henry, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Title omitted in printing)

This matter coming on to be heard this 21st day of March, 1968, before the Honorable Hewitt A. Henry, Judge of the above-entitled Court, plaintiff appearing by his counsel, Hancock & Kohls, and B. E. Kohls, and defendants appearing by John J. O'Connell, Attorney General, and J. Richard Duggan, Assistant Attorney General; the parties having introduced exhibits, presented the testimony of a witness at trial, filed trial briefs and made oral argument, the Court being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

Plaintiff, Leonard Tonasket, is now, and was at all times pertinent to this action, a full-blooded Indian, and duly enrolled member of the Colville Confederated Tribes of the State of Washington.

II.

At all times pertinent hereto, the plaintiff did operate a retail business on lands within the boundaries of the Colville reservation, which had been allotted to other members of the Colville Indian Tribe. These lands continue to be held in trust for the plaintiff by the United States of America. The business conducted by the plaintiff on these lands consists primarily of the sale of cigarettes at retail, but also involves retail sales of a limited number of other commodities.

III.

On January 13, 1965, the Colville Business Council, being the recognized governing body of the Colville Confederated Tribes, did issue its Resolution 1965-4, requesting that the Governor of the State of Washington, on behalf of the state of Washington, assume full and complete civil and criminal jurisdiction over the Colville Confederated Tribes, its members, and the lands held in trust for it and its members. This request was granted in a proclamation issued by the Governor of the State of Washington on January 29, 1965.

IV.

The plaintiff, in the operation of his business, has never collected any retail sales tax from his customers, and has never paid any excise tax to the state of Washington. On

April 10, 1967, the plaintiff was arrested and charged with one count each of the crimes of engaging in business without a valid registration certificate, of engaging in the business of selling cigarettes without a valid license to do so, of having cigarettes in his possession without the proper stamps affixed thereto, and of selling cigarettes without the proper stamps affixed thereto.

V.

By its rules and regulations, the defendant State of Washington, acting through its Department of Revenue, has precluded itself from requiring that Indians doing business entirely within an Indian reservation pay any business and occupation tax, or collect any retail sales tax upon sales made by them.

CONCLUSIONS OF LAW

I.

Plaintiff has standing to bring this action for declaratory judgment and for permanent injunction, having presented sufficient facts to bring this action within the requirements of the Uniform Declaratory Judgments Act, chapter 7.24 RCW. The Court has jurisdiction of the parties and of the subject matter of this proceeding.

II.

The state of Washington, pursuant to enabling federal legislation (Act of August 15, 1953, Public Law 280, 83rd Congress, First Session), has enacted its statute, RCW 37.12.021, permitting Indian tribes to request, and the Governor on behalf of the state to grant, assumption by the state of criminal and civil jurisdiction over the members and the territory governed by that tribe. As the term

"criminal and civil jurisdiction" is used in both the federal and state enactments, it is comprehensive, and includes the jurisdiction of the state to impose its excise taxes within the confines of any Indian reservation over which it has such jurisdiction.

III.

When, at the request of the tribe, the state assumed criminal jurisdiction, it assumed the duty of enforcing within the reservation all of the criminal sanctions which have been enacted by its legislature.

IV.

Under the provisions of 4 USCA § 104, gasoline or any other petroleum product sold by the plaintiff on the Colville Indian reservation, whether on trust or restricted lands or not, are taxable by the state of Washington.

V.

The plaintiff is not entitled to an injunction restraining the state of Washington from enforcing against the plaintiff on the Colville Indian reservation its civil and criminal laws relating to excise taxes.

DONE IN OPEN COURT this Jan. 21, 1969.

s / HEWITT A. HENRY
Judge

(Presentation Clause
omitted in printing)

JUDGMENT OF TRIAL COURT

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

LEONARD TONASKET, v. *Plaintiff,* THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Defendants.*	No. 38791 JUDGMENT

This matter coming on to be heard this 21st day of March, 1968, before the Honorable Hewitt A. Henry, Judge of the above-entitled Court, plaintiff appearing by his counsel, Hancock & Kohls, and B. E. Kohls, and defendants appearing by John J. O'Connell, Attorney General, and J. Richard Duggan, Assistant Attorney General; the parties having introduced exhibits, presented the testimony of a witness at trial, filed trial briefs and made oral argument, the Court being fully advised in the premises, did render its written Memorandum Opinion, having heretofore made and caused to be filed its Findings of Fact and Conclusions of Law;

Now, therefore, in accordance with said Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED and DECREED that, because of the assumption of criminal and civil jurisdiction over the Colville reservation by the state of Washington, the members of the Indian Tribes residing on the Colville reservation, including the plaintiff, are subject to the laws of the state of Washington imposing excise taxes, including but not limited to the provisions of chapter 82.08 RCW, imposing a retail

sales tax upon all sales within the state of Washington, and, further, are subject to enforcement by the state of its laws imposing criminal sanctions against the possession within this state of cigarettes without payment of the state taxes thereon, and affixation of the proper indicia to indicate such payment.

IT IS THEREFORE FURTHER ORDERED, ADJUDGED and DECREED that no injunction will lie restraining the defendants from enforcing against the plaintiff their civil and criminal laws relating to excise taxes, and that no order will be entered requiring the return of unstamped cigarettes seized from the possession of the plaintiff on February 10, 1967. Defendants shall be entitled to recover their costs and disbursements.

DONE IN OPEN COURT this Jan. 21, 1969.

/s/ HEWITT A. HENRY
Judge

Presented by:
J. Richard Duggan
Assistant Attorney General
Temple of Justice
Olympia, Washington 98501
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STATEMENT OF FACTS
(TRANSCRIPT OF TRIAL PROCEEDINGS)

(Title, Affidavit of Service and Index omitted in printing)

(R. 76)

BE IT REMEMBERED That heretofore and on, to-wit, the 21st day of March, 1968, the above-entitled Cause came regularly on for trial before the Honorable HEWITT

A. HENRY, one of the Judges of the Superior Court of the State of Washington, in and for the County of Thurston, sitting as Judge.

APPEARANCES:

The Plaintiff herein appearing and being represented by his attorney and counsel, B. E. KOHLS, of the firm of Hancock & Kohls;

The State of Washington herein appearing and being represented by J. RICHARD DUGGAN, Assistant Attorney General, State of Washington.

WHEREUPON, the following proceedings were had and done and testimony taken, to-wit:

(R. 77)

THE COURT: The Court is in session. This case comes on in the matter of Tonasket, Plaintiff, versus State of Washington and the Supervisor of the Tax Commission of the State of Washington, No. 38791. Are counsel ready?

MR. KOHLS: The Plaintiff is ready, Your Honor.

MR. DUGGAN: The Defendant is ready, Your Honor.

THE COURT: Are you ready to proceed?

MR. KOHLS: I don't believe it will be necessary, Your Honor, to make an Opening Statement. I think you are fully apprised of the questions involved. First, I would like to have an exhibit marked as Plaintiff's Exhibit 1.

THE CLERK: Plaintiff's Exhibit No. 1 is marked for identification.

(WHEREUPON, Request for Proclamation was marked for identification as Plaintiff's Exhibit No. 1.)

MR. KOHLS: Plaintiff's Exhibits Nos. 2 and 3, maps, Your Honor.

THE CLERK: Plaintiff's Exhibits Nos. 2 and 3 have been marked for identification.

(WHEREUPON, map of Okanogan County was marked for identification as Plaintiff's Exhibit No. 2.)

(R. 78)

(WHEREUPON, map of Town of Omak was marked for identification as Plaintiff's Exhibit No. 3.)

MR. KOHLS: Plaintiff's Exhibit 1, Your Honor, pertains to a copy of the Request For Proclamation of a resolution of the Colville Confederated Tribes submitting that its people and lands be subjected to the criminal or civil jurisdiction of the State of Washington; the various deeds, restricted deeds to the lands in question; a certified Indian census roll of 1937; and a certificate attesting to the degree of Indian blood of Leonard Tonasket.

We offer No. 1.

THE COURT: Any objection?

MR. DUGGAN: No objection.

THE COURT: Very well. What has been marked as Plaintiff's Exhibit No. 1 will be admitted in evidence.

(WHEREUPON, the Request for Proclamation and allied papers, marked Plaintiff's Exhibit No. 1, was received in evidence.)

MR. KOHLS: 2 and 3, Your Honor, are Metsker maps which contain a portion of the lands described in the deed and more or less for the purpose of education I would offer 2 and 3.

THE COURT: Any objection?

MR. DUGGAN: No objection.

(R. 79)

THE COURT: Very well. What have been marked as Plaintiff's Exhibits Nos. 2 and 3 for identification will be admitted in evidence.

(WHEREUPON, map of Okanogan County, marked Plaintiff's Exhibit No. 2, was received in evidence.)

(WHEREUPON, map of Town of Omak, marked Plaintiff's Exhibit No. 3, was received in evidence.)

MR. KOHLS: I would like to call Mr. Tonasket to the stand, please.

(R. 80)

LEONARD TONASKET, the Plaintiff herein, being called as a witness on his own behalf, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By MR. KOHLS:

Q. State your full name, please.

A. Leonard Tonasket.

Q. You are the Plaintiff in this Cause, Mr. Tonasket?

A. Yes.

Q. And where do you reside?

A. In Omak.

Q. And is that on the east side of the Okanogan River?

A. Yes.

Q. And your home is there?

A. In East Omak.

Q. Now, you are familiar with the deeds that are contained in Plaintiff's Exhibit No. 1, are you not?

A. Yes.

Q. And these are the lands that you purchased in 1965?

A. Yes, sir.

Q. By trust deed?

A. Yes, sir.

Q. And these are the lands, are they not, where the business that you operated in 1966 and '67 and up to the present time are located?

A. Yes, sir.

Q. And was specifically located at the date of your residence and confiscation of the cigarettes?

(R. 81)

A. Yes, sir.

Q. And is that land still in the same status as of the date you acquired it?

A. Yes. sir.

Q. Now, are you a member of the Confederated Tribes of the Colville Indian Reservation?

A. I am.

Q. And what is your degree of Indian blood?

A. Full-blood.

Q. And are you an allotted Indian?

A. Yes.

Q. And the lands upon which this business was conducted is being held in trust by the United States Government, is it not?

A. Yes, sir.

Q. And what type of business building do you have located on these lands?

A. It is a little store.

Q. Can you describe it?

A. You mean—

Q. What is it made of and what did it cost you to construct?

A. It is made out of cement blocks.

Q. What was the cost of construction?

A. Around $6,000.00.

Q. And where did you acquire the funds to build your place of business?

A. From the Tribal Loan Office.

Q. By that you mean you used Tribal funds?

A. Yes, sir.

(R. 82)

Q. What type of business are you operating there at the present time?

A. Cigarette business.

Q. In addition to the sale of cigarettes, do you have any other retail items that you sell?

A. Candy and pop.

Q. And do you intend to expand your operation to include the sale of other retail goods?

A. I hadn't thought too much of it yet.

Q. Now, calling your attention to the month of February of 1967, were you operating this same business on the same location?

A. No.

Q. On the same lots?

A. The same lots, yes, sir.

Q. With the same status as to the type of deed?

A. Yes, sir.

Q. And on or during the month of February, 1967, were you visited by agents of the Washington State Tax Commission?

A. Yes, sir.

Q. Would you tell the Court what happened?

A. Well, I was over in town at the time and I came back and they were in the store, the Tax men, and they were packing out the cigarettes.

Q. And you have attached to your Complaint a copy of an itemized list of the cigarettes that were confiscated?

A. Yes.

Q. And you were subsequently placed under arrest and charged by an Information in Okanogan County, Cause No. 05284, were you not?

(R. 83)

A. Yes.

Q. Are you still operating this business?

A. Yes.

Q. Where is your land located in relation to the Omak Market?

A. One block north and west.

Q. In both of the lands in question upon which you operated your business and the Omak Market, are within the corporate limits of the City of Omak, are they not?

A. (No response.)

Q. Do you understand my question?

A. No.

Q. You are located within the city limits of Omak, are you not, your place of business?

A. I believe—I don't understand your question.

Q. If you know?

A. I don't understand what you mean.

Q. Is the land upon which you operate your business within the city limits of Omak?

A. No, I am not in the city limits.

Q. You are outside the city limits?

A. Yes.

Q. Is the Omak Market, do you know?

A. They are.

Q. Within the city limits?

A. Yes.

MR. KOHLS: That is all the questions I have.

(R. 84)

CROSS EXAMINATION

By MR. DUGGAN:

Q. Mr. Tonasket, do you have a legal description of your property upon which you are operating?

A. He has (indicating counsel).

Q. Would you like to take a look at the deed and give us the legal description of the land?

A. You want me to give you—

Q. I would like to have the legal description of the land on which your building is located from which you are operating your retail situation.

A. It is a portion of S. 700, Allotment S. 700.

Q. That is within the boundaries of the present Colville Reservation?

A. Yes, sir.

Q. How many cigarettes were seized from you at the time that the Tax Commission visited you?

A. It was over eight hundred. I don't know the exact amount.

Q. Over eight hundred what?

A. Cartons.

Q. Eight thousand packages?

A. Yes—no.

Q. Did you say yes or no, Mr. Tonasket?

A. I said no.

Q. You are saying eight hundred cartons are not eight thousand packages?

A. There was a little over eight hundred cartons.

Q. Did they have cigarette stamps on them, Washington State cigarette stamps on them?

(R. 85)

A. No.

Q. Have you ever registered with the Department of Revenue of the State of Washington?

A. No.

Q. For doing business either as a retail or wholesale seller of cigarettes?

A. No, sir.

Q. Have you ever acquired any cigarette stamps?

A. No.

Q. Have you ever made an effort to register just as doing business with the State of Washington?

A. No.

Q. Could you give me an estimate of your normal inventory—is eight hundred cartons approximately your normal inventory?

A. I don't know.

Q. Approximately how many cigarettes do you sell?

A. In a day, you mean?

Q. In any period.

A. Monthly around four hundred cartons I imagine.

THE COURT: Now, is this on a monthly basis, Mr. Tonasket, four hundred cartons?

THE WITNESS: No, a day.

THE COURT: A day?

MR. DUGGAN: Four hundred cartons a day?

That sounds more like it.

Q. (By Mr. Duggan) Are your customers both Indians and non-Indians, Mr. Tonasket?

(R. 86)

A. Yes, sir.

Q. What would you say the majority of them are?

A. I really couldn't say.

Q. Have you ever required any person who indicated that he was an Indian to show you his enrollment card?

A. No.

Q. It doesn't make any difference to you whether it is an Indian or non-Indian whom you sell them to then?

A. Not at all.

Q. You indicated, Mr. Tonasket, that you were a full-blooded Indian, according to the census roll that has

been submitted in evidence, your Allotment Number is S-2026. Do you know what that stands for?

A. No.

Q. Of what age were you allotted?

A. I really couldn't say, I believe it was probably about a year old.

Q. Under what law were you allotted?

A. I don't know about that.

Q. Were you allotted on the Colville Reservation?

A. Oh, yes.

Q. Mr. Tonasket, you testified you didn't give much thought to going into the general retail business. In your Complaint, however, you indicated that you intended to do so, does this mean that you have changed your mind?

A. What do you mean, changed?

Q. The Complaint that started this action stated that you intended to go into the general retail business. You have just testified that you never gave the question much (R. 87)
thought. Does that mean that you are now not planning going into the general retail business?

A. I really don't know. I have not thought too much about it.

Q. It was also alleged in your Complaint, Mr. Tonasket, that you intended to go into the business of selling at retail motor vehicles, gasoline for cars, have you given that much thought recently?

A. No, not really.

Q. At the time that the Tax Commission personnel visited your place of business, you say that you were placed under arrest?

A. That is what it had on the warrant.

Q. Were you charged with a crime?

A. Yes.

Q. Have you been tried on that charge?

A. We had a hearing.

MR. KOHLS: I might advise he has not been tried on that charge. As a matter of fact, that trial pendency is awaiting the result of this trial.

MR. DUGGAN: I have no further questions.

MR. KOHLS: I have no further questions.

THE COURT: Very well. You may step down, Mr. Tonasket.

(WITNESS EXCUSED.)

(R. 88)

MR. KOHLS: The Plaintiff will rest, as far as the facts are concerned.

THE COURT: Do you have any evidence?

MR. DUGGAN: I have no evidence, Your Honor.

THE COURT: Very well.

(WHEREUPON, respective counsel having submitted briefs and made oral arguments to the Court; the Court took the matter under advisement and made the following

Memorandum Opinion, dated the 7th day of October, 1968:)

(Memorandum Opinion and Certificate omitted in printing)

OPINION OF WASHINGTON SUPREME COURT

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

LEONARD TONASKET, *Appellant*, v. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Respondents.*	No. 41640 EN BANC Filed Sept. 2, 1971

Appeal from a judgment of the Superior Court for Thurston County, No. 38791, Hewitt A. Henry, J., entered January 21, 1969. *Affirmed.*

Action to contest the validity of cigarette tax and licensing requirements. Plaintiff appeals from a judgment in favor of the defendant.

ROSELLINI, J.—The plaintiff is a Colville Indian of full blood, who owns a store on allotted land which is held in trust by the United States Government. His business is mainly that of selling cigarettes, and he sells approximately 400 cartons each day. His customers are Indians and non-Indians, but the majority are nonIndians.

The plaintiff has operated without the license required by RCW 19.91.120 and has not registered with the State of Washington as required by RCW 82.32.030. Furthermore, he has not complied with the requirements of RCW 82.24.050, which impose upon the cigarette retailer the duty of affixing tax stamps to cigarettes sold. The tax on 400 cartons of cigarettes would have been $440, so the state was losing at least $13,200 per month as a result of the plaintiff's operations.

In February of 1967, agents of the Washington State Department of Revenue entered the plaintiff's store, on reservation land,[1] and seized cigarettes which he had in stock. They placed the plaintiff under arrest and charged him by information with violation of the requirements of these statutes. Violations in each instance carry criminal penalties.

After the information was filed, the plaintiff brought this action for a declaratory judgment. In his complaint he declared that he was and had been in the business of selling cigarettes without affixing the tax stamps required by state law. He further declared that it was his intention in the future to expand his mercantile operation and sell other items of merchandise, including but not limited to items of wearing apparel, and appliances. He declared that it was his intention not to collect the tax imposed by statute upon sales in the state of Washington. He also declared his intent to become a vendor of liquor by the bottle, but later abandoned this declaration.

The plaintiff asked the court to declare his right to do business with Indians and nonIndians free of the requirements of the state laws pertaining to the collecting and remitting of retail sales taxes. He further asked that the Washington State Department of Revenue be enjoined from harassing him by attempting to enforce these laws.

This relief was denied by the trial court and the action was dismissed, the court finding that the plaintiff is subject to the laws of the State of Washington in the operation of his retail cigarette business.

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1. The part of the reservation on which the store is situated is within the city of Omak.

The single question on this appeal is whether the Colville Confederated Tribes of the State of Washington and its members, by accepting the criminal and civil jurisdiction of the state, authorized by Public Law 83-280, ch. 505, 67 Stat. 588, have agreed to be bound by the particular statutes, the terms of which the plaintiff has admittedly violated.

The answer lies in the scope of Public Law No. 83-280, authorizing states to assume criminal and civil jurisdiction of Indian tribes, and RCW 37.12, wherein this state declared that, upon receipt of a resolution from any tribe expressing its desire that its people be subject to such jurisdiction, the Governor shall issue a proclamation that such jurisdiction shall apply. The constitutionality of this method of assuming jurisdiction over Indian tribes has been tested in this court and has been sustained. *Makah Indian Tribe v. State,* 76 Wn.2d 485, 457 P.2d 590 (1969); *State v. Bertrand,* 61 Wn.2d 333, 378 P.2d 427 (1963); *State v. Paul,* 53 Wn.2d 789, 337 P.2d 33 (1959), *appeal dismissed,* 361 U.S. 898, 4 L.Ed.2d 155, 80 S.Ct. 203 (1959).

Public Law No. 83-280 (67 Stat. 588), which was enacted in 1953 and was in effect when this lawsuit arose, provided, *inter alia,* that certain named states should have jurisdiction over offenses committed by or against Indians on or off the reservation to the same extent that those states had jurisdiction over offenses committed elsewhere within the state and that the criminal laws of such state should have the same force and effect within such Indian country as they had elsewhere with the state. (Section 2.) It further provided in section 4 that each of those listed states should have jurisdiction over civil causes of action between Indians or to which Indians were parties, which arose in

Indian country, to the same extent that they had jurisdiction over other civil causes, and that

> those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . .

Section 2 contained the following limitation:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Section 4, conferring civil jurisdiction, contained the following limitation:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

and this reservation:

> (c) Any tribal ordinance or custom heretofore or

hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

It will be noted that these sections, by their terms, applied only to the states listed therein. However, in sections 6 and 7, the Congress authorized other states to assume criminal and civil jurisdiction.

In 1968, after this action was instituted, Congress amended section 7 by Public Law 90-284, Title IV, § 401, April 11, 1968, 82 Stat. 78, and added a requirement that before assumption of jurisdiction, a state must obtain the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected. This is the present law. *See* 25 U.S.C. § 1321 (1968). Although consent of the tribe was not required by federal law when Washington assumed jurisdiction over the Colville tribe, by its own statute it had made consent a prerequisite for the type of jurisdiction which it asserted over the plaintiff when it caused his arrest for the offenses involved in his sale of cigarettes.

RCW 37.12.021 provides:

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, or any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty

days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

As the plaintiff admits in his brief, on January 13, 1965, the Colville Business Council issued resolution 1965-4, requesting the state to assume criminal and civil jurisdiction over the Colville tribe. On January 29, 1965, Governor Daniel J. Evans issued a proclamation assuming jurisdiction over the tribe.

Thus the state has been authorized to assume and has assumed jurisdiction over offenses and civil disputes occurring on Indian reservations and involving Indians, and the question is whether there is any limitation upon that jurisdiction other than those limitations set forth in Public Law No. 83-280. The specified restrictions upon state exercise of jurisdiction are designed to protect from state interference property held in trust for the Indians by the federal government or upon which there exists a re[illegible]iction against alienation and the fishing, trapping and hunting rights of the Indian. The plaintiff does not contend that the action of the state in this case violates these limitations. Rather his position is that it was not the intent of Congress to authorize states to apply their revenue laws to business activities of Indians.

[1-3] The trial court was of the opinion that the authorization contained in Public Law No. 83-280 was plenary,

with only the limitations expressed therein, and gave the states power to regulate the merchandising activities of Indians in the same way that they regulate such activities of their citizens generally, and to levy excise taxes upon them. We agree.

The plaintiff does not argue that the act is ambiguous, but the thrust of his argument seems to be that the Congress had in mind certain limitations upon the exercise of state jurisdiction which it did not set forth in the law which it enacted. It is well settled that the court will not read into an act provisions which the court conceives that the legislative body has unintentionally omitted. *Department of Labor & Indus. v. Cook*, 44 Wn.2d 671, 269 P.2d 962 (1954). Furthermore, we cannot assume that the legislative body had in mind exceptions which it did not express when we have before us an act in which certain exceptions are clearly and concisely set forth. To use the venerable phrase, expressio unius est exclusio alterius. As expressed in more contemporary language in *State v. Roadhs*, 71 Wn.2d 705, 430 P.2d 586 (1967), affirmative specification excludes implication.

Public Law No. 83-280 clearly forbids a state to tax property held in trust for Indians over whom it assumes jurisdiction or to take other specified actions in relation to that property. The section protecting fishing, trapping and hunting rights would undoubtedly prohibit a tax or regulation which operated to deprive the Indian of those rights. But there is expressed in the act no other limitation upon the right of the state to impose taxes upon and regulate the activities of an Indian under its general laws applicable to all citizens. Under the rules of interpretation which we

have stated, there is no room to imply other limitations upon the operation of the general laws of the state.

If there were any doubt in our minds that it was the intent of Congress to make all the laws of the state, with their benefits and their burdens, applicable to the consenting tribes and their members (with exceptions noted), that doubt would be resolved by an examination of the committee report upon which the Congress acted when it passed Public Law No. 83-280. We think the purpose is manifest in the language used in the act, giving it its ordinary and commonly understood meaning, and the record shows that the purpose expressed was indeed the purpose intended.

In Senate Report No. 699, which repeats in substance House Report No. 848 on House Resolution 1063 (which became Public Law No. 83-280), the following statement regarding the act and certain companion legislation appears:

> Your Committee on Interior and Insular Affairs, through its Indian Affairs Subcommittee, and with the continuing cooperation of the Secretary of the Interior and the Indian Bureau, has, during this session, operated in five major areas of legislation affecting the Indians. This legislation, whether before the House or presently under committee consideration, has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such.

U.S.C. Cong. & Admin. News 2409 (1953).

The report drew attention to the fact that, owing to the lack of state jurisdiction to prosecute offenses and limitations upon the federal jurisdiction, as a practical matter enforcement of law within the reservation had been left largely to the Indian groups themselves, and that Indian

tribes often are not sufficiently organized to preserve law and order on the reservation. The report said:

> [C]onsequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

U.S.C. Cong. & Admin. News 2412 (1953).

Upon the question civil jurisdiction, the report stated:

> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.
>
> After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws.

U.S.C. Cong. & Admin. News 2412 (1953).

We cannot conceive that it was the intent of Congress to extend to Indians only the protection and benefits of state laws, with none of their attendant duties and responsibilities, and we find no such intention expressed in the statute. True, there are certain immunities and protections afforded the Indians in the enjoyment of their trust properties and their rights of fishing, trapping and hunting.

These place the Indian in a position of advantage not shared by other citizens.

This court has been liberal in its interpretation of the provision forbidding states which assume jurisdiction from placing burdens upon trust property. In *Snohomish County v. Seattle Disposal Co.*, 70 Wn.2d 668, 425 P.2d 22 (1967), we held that a zoning restriction could not be given effect to restrict the use of property upon which there was a restraint against alienation, even though that property had been leased to nonIndians.

The Supreme Court of the United States has not gone so far in protecting allotted and restricted lands from encumbrance. In *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L.Ed. 721, 69 S.Ct. 561 (1949), it held that the interests of nonIndian lessees in such lands were subject to state gross production taxes on petroleum produced from such lands, overruling a number of cases which had held to the contrary and reaffirming *Thomas v. Gay*, 169 U.S. 264, 42 L.Ed. 740, 18 S.Ct. 340 (1898), wherein the court had sustained a state tax on cattle grazing on tribal lands leased from Indians by the nonIndian owner of the cattle. The court found that any burden upon the land resulting from such a tax was too remote to justify a rule which would aid the lessee in escaping a nondiscriminatory tax to which he would otherwise be subject and thus to thwart the taxing power of the state.[2]

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2. We dealt with a question concerning the imposition of the tax on wholesalers in *Makah Indian Tribe v. Tax Comm'n*, 72 Wn.2d 613, 434 P.2d 580 (1967), and reached a result in harmony with that of the United States Supreme Court in *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L.Ed. 721, 69 S.Ct. 561 (1949). Note that there was no showing in that case that the Makahs submitted to the jurisdiction of the state under RCW 37.12.021, as authorized by Public Law No. 83-280.

The court quoted with approval the following excerpt from *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 82 L.Ed. 907, 58 S.Ct. 623 (1938), wherein it noted the supposed truism that the power to tax is the power to destroy,[3] and said:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government.' *Willcuts v. Bunn*, 282 U.S. 216, 225, and illustrations there cited." 303 U.S. at 385.

336 U.S. at 361.

This opinion of the United States Supreme Court would indicate that that court now entertains a liberal view with respect to the taxing power of states, but the plaintiff calls our attention to *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965), wherein the court held that the State of Arizona could not impose an excise tax upon a federally-licensed Indian trader based upon the gross proceeds of sales upon the reservation of the Navajo Indians. The plaintiff relies heavily upon this case and contends that it stands for the proposition that Congress has preempted the field of Indian trading, leaving no room for state regulation or imposition of state taxes.

The facts of that case, however, are so different in ma-

3. The opinion recalls the words of Mr. Justice Holmes in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L.Ed. 857, 48 S.Ct. 451, 56 A.L.R. 583 (1928), "The power to tax is not the power to destroy while this court sits."

terial aspects from the facts of this case that the law enunciated therein has no application here. There, the company upon which the tax was sought to be imposed had been licensed by the Commissioner of Indian Affairs to trade with the Indians. Here, the plaintiff holds no such license.[4] Furthermore, admittedly, the bulk of his trade is with non-Indians. Thus, the state tax does not interfere with a federal licensing policy as it did in the Arizona case.

However, we do not rely upon this distinction as the basis for our decision. Rather, the most important distinguishing feature is that the Navajo Indians of Arizona had not submitted themselves to the jurisdiction of the state, and the state had not assumed such jurisdiction. The court said:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.

380 U.S. at 690.

Observing that Congress had evidenced a purpose of ensuring that no burden should be imposed upon Indian traders for trading with Indians on reservations except as authorized by acts of Congress or by valid regulations promulgated under those acts, the court said that the tax in question would put financial burdens upon the trader or the Indians with whom he traded in addition to those Congress or the tribes had prescribed, and could thereby disturb the statutory plan for insuring that the prices paid by the Indians were fair. The court continued:

4. We are advised by counsel for the Washington State Department of Revenue that the Commissioner has never exercised the power given by 25 U.S.C. § 261 (1876) to license Indian traders in this state, and the plaintiff has not questioned the accuracy of his statement.

> And since federal legislation has left the State with no duties or responsibilties respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

(Footnote omitted.) 380 U.S. at 691.

Implicit in this language is a declaration that, had the Congress placed duties upon the state or authorized it to assume duties with respect to the Indians and had the state assumed such duties, a different result would have been indicated.

Here, the Congress has not only failed to preempt the field of Indian trading but it has authorized the state to assume jurisdiction over such trading; the Colville tribe has requested that the state assume such jurisdiction, and the state has accepted the responsibility. Unlike Arizona, the State of Washington does indeed have duties to perform for the Colville Indians. These Indians now enjoy all the rights and privileges which are enjoyed by citizens generally. They have the protection of all the state's criminal laws and the services of its courts and all of the benefits to which other citizens similarly situated are entitled under its civil laws.

It was the purpose of the Congress in enacting Public Law No. 83-280 to release from federal supervision and protection those Indians who wish to be released, except in the areas expressly reserved in the act, and to subject them instead to the jurisdiction of the states. It was the evident purpose of Congress to facilitate the emergence of the Indians from his inferior status as a protected (but nevertheless disadvantaged) ward of the federal government to the status of full citizen, both of the state in which he resides and of the United States, with all the privileges and responsibilities of such status.

It is suggested by the plaintiff that the regulating and taxing on his sales of cigarettes by the state interferes with tribal government. There is no showing of any actual conflict between the state laws and tribal laws, but if there were such a conflict, the state law would, under Public Law No. 83-280, be controlling. That act provides that only such tribal customs and ordinances as are not in conflict with state laws are to be preserved.

The plaintiff in this case has entered into the commercial life of the community in which he lives. He sells a product manufactured by others, the sale of which the state has found it desirable and necessary to regulate. The plaintiff does not question the right of the state to impose a tax upon the sale of cigarettes generally. But he contends that he should be exempt from the duty of collecting and remitting that tax and should thus enjoy a competitive advantage over nonIndian sellers of cigarettes. He has cited no authority which supports this proposition.

We are convinced that, when Congress enacted Public Law No. 83-280, authorizing the states to assume jurisdiction over Indian tribes and their members and providing that, after such assumption the civil laws of the state should apply to the Indians on the reservations the same as to others, it intended that the only exceptions to the operation of those laws should be those enumerated in the act. The plaintiff's business activities do not fall among those exceptions.

The judgment is affirmed.

HAMILTON, C.J., FINLEY, HALE, NEILL, SHARP, and WRIGHT, JJ., and RYAN and MIFFLIN, JJ. Pro Tem., concur.

APPELLANT'S PETITION FOR REHEARING TO WASHINGTON SUPREME COURT

(Title omitted in printing)

TO: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the State of Washington:

Appellant herein, Leonard Tonasket, respectfully presents this petition for a rehearing of the above cause and, in support thereof, respectfully shows:

1. The appeal in the cause was argued before this Court on May 24, 1971.

2. On September 2, 1971 this Court rendered its decision in favor of the respondents and against the appellant, affirming the judgment of the trial Court. In doing so, this Court ruled upon a major legal question in the field of federal Indian law which was neither presented by respondents nor opposed by appellant in the Superior Court, nor briefed or argued by either party in the Superior Court or this Court, namely, the question whether Public Law 83-280 repealed by implication the Federal Indian Trader Statutes, 25 U.S.C. §261, et seq. Since the issue is of such major importance nationally and must ultimately be decided by the Supreme Court of the United States, it is imperative that this Court grant appellant's petition for rehearing and allow counsel for both parties to thoroughly brief the matter and present further oral argument to the Court.

3. Appellant seeks a rehearing upon the following grounds:

a. Appellant is a federally sanctioned Indian trader by virtue of 25 U.S.C. §261, et seq., and as such is not subject to any regulation by the State of Washington.

b. Congress has preempted the field of regulation of Indian trading and Public Law 83-280 which authorizes the states to assume jurisdiction over Indians for certain purposes, does not repeal by implication the Federal Indian Trader Statutes, 25 U.S.C. §261, *et seq*.

c. Public Law 83-280 does not constitute an affirmative grant to the State of Washington of the power to regulate the use of trust land within an Indian Reservation by imposing a tax on an enrolled Indian operating a retail merchandise business thereon.

d. Public Law 83-280 is a law and order enactment and does not constitute an affirmative grant to the State of Washington of the power to tax either federal Indian traders or an enrolled Indian operating a retail merchandise business on trust land within an Indian Reservation.

e. Public Law 83-280 does not grant to the State of Washington the power to tax an enrolled Indian operating a retail merchandise business on trust land within an Indian Reservation, thereby violating and impinging upon tribal sovereignty.

f. State taxation of business activities of appellant in the instant case would seriously impair or destroy the federal government policy encouraging economic development of Indians and Indian tribes.

g. The court has overlooked and failed to apply relevant decisions and statutes in making its decision as further outlined in the brief attached hereto.

4. This petition is submitted in good faith and not for the purposes of delay.

Respectfully submitted,

/s/ ROBERT L. PIRTLE
/s/ MASON D. MORISSET
Of Attorneys for Appellant

DATED: October 1, 1971

REMITTITUR FROM WASHINGTON SUPREME COURT TO TRIAL COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEONARD TONASKET, *Appellant,* v. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Respondents.*	REMITTITUR No. 41640 THURSTON COUNTY No. 38791

The State of Washington to:

The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on September 2, 1971, became the final judgment of this court in the above entitled case on November 15 1971. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: Two hundred eighty-five and 50/100 ($285.50) in favor of respondent and against appellant and against United Pacific Insurance Co.

The Petition for Rehearing was denied by order dated November 15, 1971.

cc: Ziontz, Pirtle & Fulle

Mr. Robert L. Pirtle and Mr. Mason D. Morisset.

Honorable Slade Gorton, Attorney General
Mr. Michael B. Hansen, Asst.
Mr. Timothy R. Malone, Asst.

Court Reporter

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 15 day of November, A.D. 1971.

WILLIAM L. LOWRY
Clerk of the Supreme Court,
State of Washington.

[SEAL]

COPY

FILED
FEB 12 1971
E. ROBERT SEAVER, CL

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

LEONARD TOMASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

This case involves the question whether the State of Washington may impose its excise taxes on members of the Colville Confederated Tribes, tribes which are subject to State civil and criminal jurisdiction by reason of Public Law 83-280.[1]

In this case, the Supreme Court of the State of Washington has interpreted Public Law 83-280 in such a sweeping manner that the effect of the decision is to extinguish Indian exemptions and immunities from tax, including

1. App. E, p. E-2.

those flowing from other federal statutes, those implicit in federal programs and policies, and those carefully established and protected by decisions of the Supreme Court. Most important, the decision results in subjecting Indian trust property to state taxation in a manner specifically prohibited by the federal statute.

As applied by the opinion of the Washington Court, the state excise taxes, RCW Chapter 82, now apply to all Indian commerce on each of the eleven Indian reservations over which the State has assumed jurisdiction pursuant to Public Law 83-280. In fact, the Washington Court holds that Public Law 83-280 not only repeals the Federal Indian Trader Statutes but subjects Indians and Indian reservations to all state laws except those expressly excluded by its provisions.

Appellant, Leonard Tonasket, appeals to the Supreme Court from the judgment of the Washington Court issued November 15, 1971, and submits this statement to demonstrate that the Supreme Court has jurisdiction of this appeal which presents substantial federal questions.

OPINIONS BELOW

The opinion of the Washington Court is reported at 79 Wn.2d 607, 488 P.2d 281 (1971), and is reprinted as Appendix A. The superior court's Memorandum Opinion is not reported but is reprinted as Appendix B. The judgment appealed from (being the Remittitur) is reprinted as Appendix C.

JURISDICTION

On March 8, 1967, Leonard Tonasket, a full-blooded Colville Indian, filed a complaint[2] in the Superior Court

2. R. 3.

for the State of Washington for Thurston County, seeking a declaratory judgment that RCW Chapter 82, as applied, is invalid and repugnant to Article I, Section 8, clause 2 of the United States Constitution (the Indian Commerce clause), 25 U.S.C. §261 *et seq.* (the Federal Indian Trader Statutes), 24 Stat. 388 (the General Allotment Act of February 8, 1887), the sovereignty of the Colville Confederated Tribes, decisions of the Supreme Court, federal laws and regulations, and federal Indian policy. The complaint prayed that the State be enjoined from taxing, harassing, or interfering with Leonard Tonasket's retail business conducted on his trust allotment in the Colville Indian Reservation, and the State be directed to return merchandise confiscated from his business.

On March 21, 1968, the matter was tried in the superior court and on October 7, 1968, Honorable Hewitt A. Henry rendered a Memorandum Opinion[3] holding that Leonard Tonasket's business is subject to state taxes and that an injunction would not lie.

On January 21, 1969, judgment[4] was entered adjudging that all the excise tax laws of the State of Washington apply to all commerce on the Colville Indian Reservation, whether by Indian traders or not, as a direct result of assumption of jurisdiction over the Tribes and their members by the State of Washington pursuant to Public Law 83-280.

On January 23, 1969, Leonard Tonasket filed a timely Notice of Appeal.[5]

3. App. B.
4. R. 27.
5. R. 29.

On September 2, 1971, the Washington Court affirmed and expanded the decision of the superior court by rendering a written opinion[6] holding that all State laws apply to the Colville Indian Reservation and its members except those expressly excluded by Public Law 83-280.

On November 15, 1971, the Washington Court issued its Remittitur[7] to the superior court which is the judgment enforcing the written opinion of the Washington Court entered September 2, 1971.[8]

On December 10, 1971, Leonard Tonasket filed, in the Washington Court, a Notice of Appeal[9] to the Supreme Court.

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U.S.C. §1257(2) which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685, 686 (1965); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288, 289 (1921).

6. App. A.
7. App. C.
8. RCW 2.04.170, Supreme Court Administrative Rules, Rule 15.
9. App. D.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article I, section 8, clause 2[10] (the Indian commerce clause).

25 U.S.C. §261 *et seq.*, (19 Stat. 200, 1876)[11] (Indian Traders Act).

25 C.F.R. §251 (1965)[12] (regulations of the Bureau of Indian Affairs pertaining to Indian traders).

25 C.F.R. §91.12, §91.13[13] (regulations of the Bureau of Indian Affairs pertaining to loans of tribal funds).

Public Law 83-280 (67 Stat. 588, 18 U.S.C. §1162; 28 U.S.C. §1360)[14] (authorizing states to assume certain jurisdiction over Indian country).

Executive Order of July 2, 1872, 1 Kapp. 916[15] (establishing the Colville Indian Reservation).

Constitution and By-Laws of the Confederated Tribes of the Colville Indian Reservation, Washington.

(Of the following statutes, only those with footnotes appear in Appendix E.)

Title 82 of the Revised Code of Washington covers all of the excise taxes imposed by Washington State law, and the following chapters are involved herein:

Chapter 82.04—business and occupation tax on manufacturers, retailers and other forms of business.

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10. App. E, p. E-1.
11. App. E, p. E-1.
12. App. E, p. E-5.
13. App. E, p. E-6.
14. App. E, p. E-2.
15. App. E, p. E-8.

Chapter 82.08—retail sales tax on all retail sales.

Chapter 82.12—use tax on use of personal property the state.

Chapter 82.16—public utility tax, imposing a tax all persons engaging in certain businesses.

Chapter 82.20—documentary stamp tax on all doc ments transferring interests in land.

Chapter 82.24—tax on cigarettes.
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82.24.110—Other offenses—Penalty.[17]

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82.32.290—Unlawful acts—Penalties.[21]

Chapter 82.36—motor vehicle fuel tax.

Chapter 82.40—use fuel tax.

Chapter 82.44—motor vehicle excise.

Chapter 82.48—arcraft excise.

Chapter 82.50—house trailer excise.

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16. App. E, p. E-8.
17. App. E, p. E-8.
18. App. E, p. E-10.
19. App. E, p. E-10.
20. App. E, p. E-11.
21. App. E, p. E-12.

QUESTIONS PRESENTED

The basic questions presented are the following:

1. May state excise taxes be validly imposed upon Indian commerce conducted within the boundaries of an Indian reservation, where failure to pay such taxes may result in levy and sale of real or personal property of the Indian taxpayer?

2. Does Public Law 83-280 impliedly repeal the Federal Indian Trader Statutes on Indian reservations which are subject to state civil and criminal jurisdiction?

3. Does Public Law 83-280 make all state laws except those expressly excluded by its provisions, applicable to Indians and Indian reservations which are subject to state civil and criminal jurisdiction?

STATEMENT OF THE CASE

The Colville Confederated Tribes comprise eleven separate tribes of Indians who formerly occupied large areas of Eastern Washington until they were placed upon the Colville Indian Reservation established by Executive Order of the President of the United States in 1872.[22] The Tribes are recognized by the United States Government, Bureau of Indian Affairs, and are governed by a Constitution and By-Laws approved by the Secretary of the Interior, on December 26, 1938. Of the 5,340 enrolled members of the Tribes, approximately half live on the Colville Indian Reservation which encompasses 1.3 million acres and is governed by the 14-member Colville Business Council.

22. App. E, p. E-8.

The land upon which Leonard Tonasket operates his retail store is allotted land held in trust for him by the United States.

Leonard Tonasket, a full-blooded enrolled member of the Colville Confederated Tribes, is a direct descendant of Chief Tonasket of the Okanogan Band, one of the eleven tribes in the confederacy on the Colville Indian Reservation.

In 1963 Leonard Tonasket leased a store in East Omak on the Colville Indian Reservation and established a retail business, selling cigarettes and other merchandise. On April 9, 1964, Leonard Tonasket applied to the Tribal Loan Office for a loan of federally restricted trust funds in the sum of $1,000 specifically for the purchase of a larger cigarette inventory.[23] Mr. Robert D. Holtz, Area Director of the Bureau of Indian Affairs for the Portland Area Office, approved[24] the cigarette inventory loan in the sum of $800, and a mortgage upon Mr. Tonasket's trust allotment S-2026 was given to secure the loan, all pursuant to the provisions of 25 C.F.R. §91.12 *et seq.* Thereafter Leonard Tonasket borrowed an additional $6,000 from the Tribal Loan Office with which to construct a new store building on his trust allotment to expand his retail business.[25]

Because the Federal Indian Trader Statutes do not require a license of a trader on an Indian reservation who is a full-blooded Indian (25 U.S.C §264), Leonard Tonasket could not be required to apply for a federal trader's license. And because he is a full-blooded enrolled member of the Colville Confederated Tribes operating a retail store

23. R. 117.
24. R. 118.
25. R. 81.

on his trust land with the full sanction of the federal government and with federally-restricted funds, Leonard Tonasket did not register with the State of Washington or affix tax stamps to cigarettes in his possession and being sold in his business.

In February of 1967, agents of the Washington Tax Commission entered the Colville Indian Reservation, seized a great number of cigarettes from Leonard Tonasket's trust land, and placed him under arrest for failing to register with the Tax Commission in violation of RCW 82.32.030 and RCW 82.32.290, possessing unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110, and selling unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110.

Approximately 800 cartons of cigarettes were seized from Leonard Tonasket's trust land. As a result of the action of the Washington Tax Commission, Leonard Tonasket commenced the present action in the superior court for Thurston County.

HOW THE FEDERAL QUESTION WAS PRESENTED

Leonard Tonasket's Complaint:

Leonard Tonasket's Complaint averred that he is a full-blooded enrolled member of the Colville Confederated Tribes and operates his retail store on allotted trust land on the Colville Indian Reservation held for him by the United States. The Complaint avers the unlawful entry on Leonard Tonasket's premises by officials of the Washington Tax Commission, their illegal seizure of his cigarettes and his arrest and subjection to criminal charges in the superior court for Okanogan County.

The Complaint prayed for a declaratory judgment declaring Leonard Tonasket entitled to operate his retail business on his trust land on the Colville Indian Reservation free from the provisions of the State excise tax statutes or from State harassment or interference, and for judgment requiring the State of Washington to return all cigarettes illegally confiscated from his trust land.

Memorandum Opinion of the Superior Court of Washington:

The superior court granted judgment in favor of the State, upholding the validity of the actions of the Washington Tax Commission. In its Memorandum Opinion, the trial court stated:[26]

> "In conclusion, the Court is of the opinion that, while the law as cited by the Plaintiff is controlling as to those Indian tribes which have not allowed the assumption of criminal and civil jurisdiction by the state of Washington, in those cases where civil and criminal jurisdiction has been accepted by the state of Washington, the members of the Indian tribes therein are subject to the excise taxes complained of by the Plaintiff herein and the state may further enforce the criminal laws of the state relating to the possession of unstamped cigarettes."

Judgment of the Superior Court of Washington:

In the Judgment, the superior court held:[27]

> "IT IS ORDERED, ADJUDGED and DECREED that, because of the assumption of criminal and civil jurisdiction over the Colville reservation by the state of Washington, the members of the Indian Tribes residing on the Colville reservation, including the plaintiff, are subject to the laws of the state of Washington imposing excise taxes, including but not limited to

26. App. B, p. B-3.
27. R. 27-28.

the provisions of chapter 82.08 RCW, imposing a retail sales tax upon all sales within the state of Washington, and, further, are subject to enforcement by the state of its laws imposing criminal sanctions against the possession within this state of cigarettes without payment of the state taxes thereon, and affixation of the proper indicia to indicate such payment."

Leonard Tonasket's Brief to the Washington Supreme Court:

On appeal to the Washington Court, Leonard Tonasket, through assignments of error and argument, renewed his position that the judgment of the superior court imposing State excise taxes upon retail sales on trust land in the Colville Indian Reservation violates Article I, Section 8, clause 2 of the Constitution of the United States, 10 Stat. 172 (the Act of Congress Establishing the Territory of Washington), 25 Stat. 676 (the Enabling Act of the State of Washington), Article XXVI of the Washington State Constitution, 67 Stat. 588 (Public Law 83-280), 25 U.S.C. §261 *et seq.* (the Federal Indian Trader Statutes), 25 C.F.R. §251 *et seq.*, 24 Stat. 388 (the General Allotment Act of February 8, 1887), RCW 37.12.060, and the decisions of the Supreme Court in *United States v. Rickert,* 188 U.S. 432 (1903), *Squire v. Capoeman,* 351 U.S. 1 (1956), *Williams v. Lee,* 358 U.S. 217 (1959), *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965), federal Indian policy and the tribal sovereignty of the Colville Confederated Tribes.

The Opinion of the Washington Supreme Court:

The Washington Court viewed the case as raising only a single question. On page 609 of the Opinion the court stated:

"The single question on this appeal is whether the Colville Confederated Tribes of the State of Wash-

> ington and its members, by accepting the criminal and civil jurisdiction of the state, authorized by Public Law 83-280, ch. 505, 67 Stat. 588, have agreed to be bound by the particular statutes, the terms of which the plaintiff has admittedly violated."

A more thorough analysis of the opinion reveals that the Washington Supreme Court ruled upon three far more basic questions, namely:

1. May state excise taxes be validly imposed upon Indian commerce conducted within the boundaries of an Indian reservation, where failure to pay such taxes may result in levy and sale of real or personal property of the Indian taxpayer?

2. Does Public Law 83-280 impliedly repeal the Federal Indian Trader Statutes on Indian reservations which are subject to state civil and criminal jurisdiction?

3. Does Public Law 83-280 make all state laws except those expressly excluded by its provisions, applicable to Indians and Indian reservations which are subject to state civil and criminal jurisdiction?

The Washington Court answered the first question on page 613 of the Opinion:[28]

> ". . . there is expressed in the act no other limitation upon the right of the state to impose taxes upon and regulate the activities of an Indian under its general laws applicable to all citizens. Under the rules of interpretation which we have stated, there is no room to imply other limitations upon the operation of the general laws of the state."

The Washington Court answered the second question on page 618 of the Opinion:[29]

> "Here, the Congress has not only failed to preempt the field of Indian trading but it has authorized the

28. App. A, p. A-6.
29. App. A, p. A-10.

state to assume jurisdiction over such trading; the Colville tribe has requested that the state assume such jurisdiction, and the state has accepted the responsibility."

The Washington Court answered the third question on page 619 of the Opinion:[30]

"We are convinced that, when Congress enacted Public Law No. 83-280, authorizing the states to assume jurisdiction over Indian tribes and their members and providing that, after such assumption the civil laws of the state should apply to the Indians on the reservations the same as to others, it intended that the only exceptions to the operation of those laws should be those enumerated in the act. The plaintiff's business activities do not fall among those exceptions.

"The judgment is affirmed."

THE FEDERAL QUESTION IS SUBSTANTIAL

The Opinion of the Washington State Supreme Court has the effect of extinguishing at one stroke all federally-established exemptions for Indians and their property from the effect of state taxation. In this sweeping decision, the Washington Court has given an interpretation to Public Law 83-280 which ignores the plain language of the statute, ignores the policies promulgated by the federal government in pursuit of its trust responsibilities for the American Indian people, and misconstrues the effect of decisions of the Supreme Court preserving the plenary authority of Congress in the field of Indian commerce.

1. Imposition of State Excise Taxes on Indian Personal Property Is Prohibited by Public Law 83-280.

The State of Washington seeks to justify extension of State excise taxes to members of the Colville Confederated Tribes on the basis of Public Law 83-280, which it claims

30. App. A, p. A-11.

to be a Congressional grant of power to the states to subject Indians to all state laws except those expressly prohibited by the exclusion clauses of Public Law 83-280. While Leonard Tonasket does not contend that the cigarettes seized were trust property, he does contend that they are exempt from operation of state tax, for reasons which will be elaborated upon. However, the sweeping decision of the Washington Court has the effect of holding that *all Washington State excise tax laws* are applicable to Leonard Tonasket.

The Washington Court examined the exclusion provisions of Section 4 of Public Law 83-280 which read:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

and found no conflict between the State excise tax system and the federal limitation on state jurisdiction. The Washington Court then ruled that Public Law 83-280 has given the State broad authorization for imposition of all of its laws.

Of crucial importance, however, are the substantive provisions of State excise tax laws which provide remedies for default in payment of tax. RCW 82.32.210 provides in part:

> "If any tax, increase, or penalty or any portion

thereof is not paid within fifteen days after it becomes due, the tax commission may issue a warrant under its official seal directed to the sheriff of any county of the state, commanding him *to levy upon and sell the real and/or personal property of the taxpayer* found within his county, or so much thereof as may be necessary, for the payment of the amount of such warrant . . ." (Emphasis supplied)

RCW 82.32.240 provides in part:

"Any tax due and unpaid and all increases and penalties thereon, shall constitute a debt to the state and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies.

"In all cases of probate, insolvency, assignment for the benefit of creditors, or bankruptcy, involving any taxpayer, the claim of the state for said taxes and all increases and penalties thereon *shall be a lien upon all real and personal property of the taxpayer,* and the mere existence of such cases or conditions shall be sufficient to create such lien without any prior or subsequent action by the state . . ." (Emphasis supplied)

In *Stevens v. Commissioner of Internal Revenue,* ..... F.2d ..... (November 26, 1971), the Ninth Circuit Court of Appeals ruled that the federal government may not impose income tax on earnings derived from allotted trust lands owned by an Indian taxpayer. The decision is based upon the principle enunciated in *Squire v. Capoeman,* 351 U.S. 1 (1956).

Squire dealt with an attempt by the federal government to tax income from the sale of timber of allotted trust land granted to Indian taxpayers under the provisions of the General Allotment Act of 1887 (24 Stat. 388). The Supreme Court held that Section 5 of that Act, requiring con-

veyance of the lands to the Indian allottees in fee "free from all charge or encumbrances," and Section 6 of that Act, providing that when an Indian allottee receives a patent in fee simple, his former trust land "shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent," necessarily exempted from federal income tax all income derived from timber sales. The rationale of the Supreme Court was that if such income were subject to federal income tax, then nonpayment of the tax would result in a tax lien upon the trust land or a prior debt which would attach to the land upon its receipt by the Indian allottee in fee simple, either of which would violate the Act.

In *United States v. Rickert,* 188 U.S. 432 (1903), the State of South Dakota sought to impose its personal property tax on a cow, horses and two wagons supplied by the United States government to a tribal Indian. Holding that this direct tax would not lie, the Supreme Court held at page 442:

> "These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract . . . The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. . . ."

Thus the Supreme Court has prohibited taxation of income derived from trust land and has prohibited taxation of personal property used in the economic development of trust land. Both decisions rest squarely upon the trust status of Indian land and the federal protection carefully

provided by Congress in Sections 5 and 6 of the General Allotment Act.

Here, nonpayment of state excise tax by Leonard Tonasket would, under state law, result in a tax lien upon his personal or real property at the discretion of state taxing authorities, or a prior debt which would attach to his personal or real property upon its receipt in fee simple. This is precisely what Congress has declared may not be done by a state under the exclusion provisions of Public Law 83-280, and this is precisely what the Supreme Court has declared may not be done in *Squire* and *Rickert*.

It is of interest to note that Washington state law itself imposes a restraint upon the state. RCW 82.26.040 provides:

> "The tax imposed by RCW 82.26.020 shall not apply with respect to any tobacco products which under the Constitution and laws of the United States may not be made the subject of taxation by this state."

The Opinion of the Washington Court, therefore, imposes on Indians in Washington the entire structure of state excise taxes and the laws governing their administration and imposition, which has the inherent effect of encumbering Indian real and personal trust property, in violation of the express prohibition of Public Law 83-280.

2. Congress Has Exclusive Jurisdiction of Trading on Indian Reservations.

Jurisdiction of the United States over Indian commerce is "exclusive and unfettered," *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), and includes "commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407 (1865). Pursuant to its constitutional authority, Congress has enacted comprehensive federal regulations over Indian commerce.

25 U.S.C. §261 provides:

> "The Commissioner of Indian Affairs shall have the *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." (Emphasis supplied)

Traders who are also full-blooded Indians are subject to federal regulation as well, *United States v. Parton*, 132 F.2d 886 (1943), but are exempt from the licensing requirement of 25 U.S.C. §264 which provides:

> "Any person *other than an Indian of the full blood* who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: . . ." (Emphasis supplied;

In *Warren Trading Post Company v. The Arizona State Tax Commission*, 380 U.S. 685 (1965), the Supreme Court noted that federal pre-emption of Indian commerce is predicated upon a philosophy of protecting Indians. In *Warren*, Mr. Justice Black stated at page 691:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put *financial burdens on appellant or the Indians with whom it deals* in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commisisoner." (Emphasis supplied)

The Supreme Court also made it crystal clear that federal pre-emption of Indian commerce is total and exclusive. On page 690 of *Warren*, Mr. Justice Black stated:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.*" (Emphasis supplied)

The attempt by the Washington Court to distinguish away the holding of the Supreme Court in *Warren* on the ground that Arizona had not assumed jurisdiction over the Navajo reservation is specious. The Supreme Court acknowledged the existence of Public Law 83-280 jurisdiction in footnote 3 on page 687 of *Warren*, but nevertheless made no exception in its holding for states which have assumed jurisdiction pursuant to Public Law 83-280. The true basis for the *Warren* decision is the federal policy of total protection of Indian economy including both sales and purchases by Indians. Nothing in Public Law 83-280 purports to diminish that protection.

Leonard Tonasket is a full-blooded Indian and an enrolled member of the Colville Confederated Tribes doing business on trust land inside the Reservation. Application of State excise tax to his retail business is directly contrary to Article I, Section 8, clause 2 of the United States Constitution.

Further, Leonard Tonasket not only received federal sanction to trade on the Colville Indian Reservation, he received two loans of federally-restricted trust funds, approved by the Area Director of the Bureau of Indian Affairs

pursuant to 25 C.F.R. §91.12 *et seq.*,[31] for purchase of cigarette inventory and for construction of his store building. Accordingly, Leonard Tonasket is a federal Indian trader and application of State excise tax to his retail business in this case is directly contrary to 25 U.S.C. §261 *et seq.* and the *Warren* opinion.

3. Federal Policy Prohibits State Taxation of Indians and Their Property and Commercial Activity on Indian Reservations.

Land has always occupied a position of unique importance to the American Indian and remains the *sine qua non* of Indian existence as a people. Accordingly, the single most important protection for the Indian is the trust status imposed upon Indian land by the federal government and the long-established federal policy protecting its use. The federal policy is to protect the Indian trust land and personal property and their use by providing financial advantages and thus to encourage Indians to become economically independent. *Squire v. Capoeman, supra.*

The financial advantages provided by federal policy are attainable only by maximization of the value of trust land through economic development, and extend to personal property used in connection with trust land as well as the land itself. *United States v. Rickert, supra.* In today's society, it is as much the government's desire to foster successful business enterprises on Indian reservations as it is to encourage farming, ranching and fishing. *Makah v. Clallam County*, 73 Wn.2d 677, 686.

So paramount is the federal policy and so closely tied to Indian trust land that it was specifically provided for

31. App. E, p. E-6.

in Section 5 of the General Allotment Act, *supra*, and specifically preserved intact in Section 2(b) and Section 4(b) of Public Law 83-280 in the following language:

> "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto . . ."

Since a central goal of the federal policy underlying trust status of Indian land is profitability of Indian enterprises, it follows that the measure of the federal policy's success is the degree of economic improvement in the Indian's position.[32] State tax upon commercial activity or personal property on the Colville Indian Reservation diminishes its profitability and directly interferes with the central policy goal.

In *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961), the Supreme Court voided a county personal property tax upon mineral rights owned by the Federal Land Bank. The decision turned upon the fact that the federal purpose of the Bank was to provide agricultural loans at low interest rates which was partially accomplished by distributing profits to its shareholder-borrowers, and any reduction of profits interfered with optimal achievement of the Bank's governmental functions.

The purpose underlying federal Indian policy is analogous since it depends directly upon maximum profitability of Indian trust land. Providing economic aid to Indians through prohibition of state taxation of property used on trust land or commercial activity on trust land is a federally protected governmental activity.

32. Comment, "Indian Taxation: Underlying Policies and Present Problems," 59 Cal. L. Rev. 1261, 1276.

4. Application of State Excise Tax Violates Tribal Sovereignty of the Colville Confederated Tribes.

While Congress has increasingly subjected Indian tribes to state laws, particularly through Public Law 83-280, one important limitation on state authority over Indian reservations remains: unless jurisdiction is expressly granted by the federal government, it is denied to the state in all matters that would interfere with a tribe's right of self-government.

This principle is stated in Federal Indian Law, Felix S. Cohen, U.S. Government Printing Office, 1966 Revision by Solicitor General, at page 443:

> "In its quasi-sovereign capacity and in the exercise of local self-government, it may exercise powers similar to those exercised by any state or municipal corporation in regulating the use and disposition of private property save insofar as it is restricted by specific statutes of Congress."

This principle has been repeatedly upheld by the Supreme Court. In *Warren*, the Supreme Court stated at page 687:

> "Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of congress, or where they clearly do not interfere with federal policies concerning the reservations."

The inherent sovereign right of the Colville Confederated Tribes to regulate the use and disposition of property and commercial activity on the Colville Indian Reservation is preserved in Article V of the Tribal Constitution:

> "(e) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon non-members doing business within the Reservation,

or obtaining special rights or privileges, and the same may be applied to members of the Tribes provided such ordinances have been approved by a referendum of the Confederated Tribes."

The Tribes' sovereignty over commercial activity on the Reservation includes the power to levy taxes and a corollary immunity of such commercial activity from the myriad excise tax provisions of RCW Chapter 82.

In the face of this clear reservation of tribal sovereignty over commercial activity on the Reservation, Congress has not seen fit to grant specific taxing authority to the State of Washington. The opinion of the Washington Court violates the Tribes' sovereign power to tax commercial activity on the Reservation and interferes with the Tribes' right to determine a desirable tax level for such activity whenever the poverty status of their members is sufficiently alleviated to allow them to impose taxes.

5. Public Law 83-280 Does Not Authorize State Taxation of Indians and Their Property and Commercial Activity on the Colville Indian Reservation.

The Opinion of the Washington Court that Public Law 83-280 has authorized the states to assume jurisdiction over trading on Indian reservations is directly contrary to two well-established doctrines of law of the Supreme Court.

One doctrine holds that whenever possible, federal statutes are *not* to be deemed repealed by implication. In *Frost v. Wenie,* 157 U.S. 46, the Supreme Court held at page 58:

"It is well settled that repeals by implication are not to be favored. And where two statutes cover, in

> whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—*no purpose to repeal being clearly expressed or indicated*—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute." (Emphasis supplied)

The second doctrine is the general rule that all treaties, statutes and laws are to be liberally construed to protect the rights of Indians and any ambiguities resolved in the Indians' favor. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Supreme Court stated at page 89:

> ". . . statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."

Again, in *Winters v. United States*, 207 U.S. 564 (1907), the Supreme Court held at page 576:

> "By rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." (Emphasis supplied)

An analysis of Public Law 83-280 reveals no purpose, clearly expressed or indicated, to repeal or in any way abrogate the Federal Indian Trader Statutes or the tax immunity of Indians and their property and commercial activity on Indian reservations. Nor is the language of Public Law 83-280 so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the subject of Indian trading or Indian tax immunity in any way whatsoever.

To the contrary, Public Law 83-280 was a "law and order" statute which merely authorized states to assume jurisdiction over civil disputes involving Indian litigants and to prosecute criminal activity occurring on Indian reservations. The Washington Court applied the legal maxim "expressio unius est exclusio alterius" to Public Law 83-280 and held that the exclusion clauses *impliedly* grant the State taxing power. This specious conclusion is readily demolished by applying "expressio unius" to Public Law 83-280. Section 2 repeals 18 U.S.C. 1152 (Assimilative Crimes Act) and 18 U.S.C. 1161 (Ten Major Crimes Act) on Indian reservations in which states assume jurisdiction. But no repeal is made of 18 U.S.C. 1161 which allows tribes to control reservation liquor sales and which was enacted the same day as Public Law 83-280! By "expressio unius" Public Law 83-280 continues 18 U.S.C. 1161 in effect and state law cannot apply to liquor sales ***even in reservations subject to state jurisdiction.***

Since 18 U.S.C. 1161 was not listed in the exclusion clauses of Public Law 83-280, "expressio unius" cannot possibly support the Washington Court's holding that all state laws apply except those specifically excluded by Public Law 83-280.

Just as 18 U.S.C. 1161 was unaffected by Public Law 83-280, so were the Federal Indian Trader Statutes and so was the federal Indian policy of protecting Indian trust land and its use from state taxation.

The only reasonable reading of the exclusion clauses of Public Law 83-280, in light of the doctrine that statutes be liberally construed to protect Indian rights with ambiguities resolved in the Indians' favor, is that those clauses indicate *only* what Public Law 83-280 does not do.

This conclusion is bolstered by *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957). In 59 Cal. L. Rev. 1261, *supra*, the author states at page 1267 that the *Kirkwood* case is "strong support" for the proposition that:

> "This clause clearly expresses Congress' intent that Public Law 280 should not expand state taxation of trust or restricted Indian real or personal property. Since the purpose of many Indian tax privileges is either to maximize the value of Indian property in fulfillment of the commitment to economic development or to recognize tribal sovereignty, *Public Law 280 should not be read to expand state power over other Indian-related tax exemptions; to do so would be inconsistent with federal policy.*" (Emphasis supplied)

An analysis of the legislative history of Public Law 83-280 reveals no reference to a grant of taxing power to states, nor any objection to the Act by Indians on that basis.

Finally, the Opinion of the Washington Court violates the specific holding of the Supreme Court in *Metlakatla Indian Community v. Egan*, 369 U.S. 46 (1962).

Metlakatla dealt with Indian fishing regulations promulgated by the Secretary of the Interior and in effect *prior to creation of the State of Alaska.* Alaska argued that the Statehood Act transferred control of all fishing to the state with no exception for Indian fishing. The Supreme Court noted that fishing rights given by regulation were *not* within the exclusion clauses of Public Law 83-280, but nevertheless ruled against Alaska and declined to apply the maxim "expressio unius" with respect to the extent of rights granted to states under Public Law 83-280.

The clear import of *Metlakatla* is that where Congress has pre-empted an area of Indian law by granting the

Secretary of the Interior power to regulate, a subsequent Congressional act imposing some general measure of state control over Indians does not repeal the pre-emption by implication. *Specific language of repeal is required* in consonance with the long-standing doctrines disfavoring repeal of federal statutes by implication and resolving all ambiguities in favor of Indians.

Thus the federal questions raised in this appeal are as substantial as (1) the basic right of the Colville Confederated Tribes to maintain their sovereign power of regulation and taxation of commercial activity on the Colville Indian Reservation, (2) the clearly discernible federal policy of encouraging Indians to become economically self-sufficient by developing successful business enterprises on trust land free from state taxation, and finally, (3) the question whether Public Law 83-280 repeals the Federal Indian Trader Statutes and constitutes a grant of authority to the states to impose tax laws and all other state laws on Indian Reservations except those specifically excluded by Public Law 83-280.

This case is appealed pursuant to 28 U.S.C. §1257 (2) from the highest court of the State of Washington, the Washington Supreme Court. The appeal is taken from the Washington Court's Remittitur which constitutes the final judgment and which became effective as of its date of entry, November 15, 1971. It is not subject to further correction or review since it stems from a decision *en banc*.

The decision of the Washington Court affirmed the decision of the superior court for Thurston County. Both courts

sustained application of State excise tax provisions of RCW Chapter 82 against the contentions of Leonard Tonasket that such application violated the United States Constitution, federal statutes, regulations and policy, decisions of the Supreme Court and the tribal sovereignty of the Colville Confederated Tribes. Both courts based their opinions upon federal grounds. The raising of the federal questions was timely and they were so presented as to qualify for an appeal pursuant to 25 U.S.C. §1257 (2). *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

CONCLUSION

This appeal raises the important federal questions:

1. May state excise taxes be validly imposed upon Indian commerce conducted within the boundaries of an Indian reservation, where failure to pay such taxes may result in levy and sale of real or personal property of the Indian taxpayer?

2. Does Public Law 83-280 impliedly repeal the Federal Indian Trader Statutes on Indian reservations which are subject to state civil and criminal jurisdiction?

3. Does Public Law 83-280 make all state laws except those expressly excluded by its provisions, applicable to Indians and Indian reservations which are subject to state civil and criminal jurisdiction?

The federal questions are substantial and for proper resolution and consideration require briefs on the merits and oral argument. Determination of these matters is necessary to maintain the plenary power of the United States

over Indian tribes and trust land on Indian reservations, to protect Indian tribes in the exercise of their governmental sovereignty and to protect their private property from state invasion.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEONARD TONASKET, *Appellant*, v. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Respondents.*	No. 41640 En Banc Filed September 2, 1971

ROSELLINI, J.—The plaintiff is a Colville Indian of full blood, who owns a store on allotted land which is held in trust by the United States Government. His business is mainly that of selling cigarettes, and he sells approximately 400 cartons each day. His customers are Indians and non-Indians, but the majority are nonIndians.

The plaintiff has operated without the license required by RCW 19.91.120 and has not registered with the State of Washington as required by RCW 82.32.030. Furthermore, he has not complied with the requirements of RCW 82.24.050, which impose upon the cigarette retailer the duty of affixing tax stamps to cigarettes sold. The tax on 400 cartons of cigarettes would have been $440, so the state was losing at least $13,200 per month as a result of the plaintiff's operations.

In February of 1967, agents of the Washington State Department of Revenue entered the plaintiff's store, on reservation land,[1] and seized cigarettes which he had in stock. They placed the plaintiff under arrest and charged him by information with violation of the requirements of these statutes. Violations in each instance carry criminal penalties.

After the information was filed, the plaintiff brought this action for a declaratory judgment. In his complaint he declared that he was and had been in the business of selling

1. The part of the reservation on which the store is situated is within the city of Omak.

cigarettes without affixing the tax stamps required by state law. He further declared that it was his intention in the future to expand his mercantile operation and sell other items of merchandise, including but not limited to items of wearing apparel, and appliances. He declared that it was his intention not to collect the tax imposed by statute upon sales in the state of Washington. He also declared his intent to become a vendor of liquor by the bottle, but later abandoned this declaration.

The plaintiff asked the court to declare his right to do business with Indians and nonIndians free of the requirements of the state laws pertaining to the collecting and remitting of retail sales taxes. He further asked that the Washington State Department of Revenue be enjoined from harassing him by attempting to enforce these laws.

This relief was denied by the trial court and the action was dismissed, the court finding that the plaintiff is subject to the laws of the State of Washington in the operation of his retail cigarette business.

The single question on this appeal is whether the Colville Confederated Tribes of the State of Washington and its members, by accepting the criminal and civil jurisdiction of the state, authorized by Public Law 83-280, ch. 505, 67 Stat. 588, have agreed to be bound by the particular statutes, the terms of which the plaintiff has admittedly violated.

The answer lies in the scope of Public Law No. 83-280, authorizing states to assume criminal and civil jurisdiction of Indian tribes, and RCW 37.12, wherein this state declared that, upon receipt of a resolution from any tribe expressing its desire that its people be subject to such jurisdiction, the Governor shall issue a proclamation that such jurisdiction shall apply. The constitutionality of this method of assuming jurisdiction over Indian tribes has been tested in this court and has been sustained. *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969); *State v. Bertrand*, 61 Wn.2d 333, 378 P.2d 427 (1963); *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959), *appeal dismissed*, 361 U.S. 898, 4 L. Ed.2d 155, 80 S. Ct. 203 (1959).

Public Law No. 83-280 (67 Stat. 588), which was enacted in 1953 and was in effect when this lawsuit arose,

provided, *inter alia*, that certain named states should have jurisdiction over offenses committed by or against Indians on or off the reservation to the same extent that those states had jurisdiction over offenses committed elsewhere within the state and that the criminal laws of such state should have the same force and effect within such Indian country as they had elsewhere with [sic] the state. (Section 2.) It further provided in section 4 that each of those listed states should have jurisdiction over civil causes of action between Indians or to which Indians were parties, which arose in Indian country, to the same extent that they had jurisdiction over other civil causes, and that

> those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . .

Section 2 contained the following limitation:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Section 4, conferring civil jurisdiction, contained the following limitation:

> (b) Nothing in this section shall authorize the alie..ation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regu-

lation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

and this reservation:

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

It will be noted that these sections, by their terms, applied only to the states listed therein. However, in sections 6 and 7, the Congress authorized other states to assume criminal and civil jurisdiction.

In 1968, after this action was instituted, Congress amended section 7 by Public Law 90-284, Title IV, § 401, April 11, 1968, 82 Stat. 78, and added a requirement that before assumption of jurisdiction, a state must obtain the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected. This is the present law. *See* 25 U.S.C. § 1321 (1968). Although consent of the tribe was not required by federal law when Washington assumed jurisdiction over the Colville tribe, by its own statute it had made consent a prerequisite for the type of jurisdiction which it asserted over the plaintiff when it caused his arrest for the offenses involved in his sale of cigarettes.

RCW 37.12.021 provides:

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this

> state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

As the plaintiff admits in his brief, on January 13, 1965, the Colville Business Council issued resolution 1965-4, requesting the state to assume criminal and civil jurisdiction over the Colville tribe. On January 29, 1965, Governor Daniel J. Evans issued a proclamation assuming jurisdiction over the tribe.

Thus the state has been authorized to assume and has assumed jurisdiction over offenses and civil disputes occurring on Indian reservations and involving Indians, and the question is whether there is any limitation upon that jurisdiction other than those limitations set forth in Public Law No. 83-280. The specified restrictions upon state exercise of jurisdiction are designed to protect from state interference property held in trust for the Indians by the federal government or upon which there exists a restriction against alienation and the fishing, trapping and hunting rights of the Indian. The plaintiff does not contend that the action of the state in this case violates these limitations. Rather his position is that it was not the intent of Congress to authorize states to apply their revenue laws to business activities of Indians.

[1-3] The trial court was of the opinion that the authorization contained in Public Law No. 83-280 was plenary, with only the limitations expressed therein, and gave the states power to regulate the merchandising activities of Indians in the same way that they regulate such activities of their citizens generally, and to levy excise taxes upon them. We agree.

The plaintiff does not argue that the act is ambiguous, but the thrust of his argument seems to be that the Congress had in mind certain limitations upon the exercise of state jurisdiction which it did not set forth in the law which it enacted. It is well settled that the court will not read into an act provisions which the court conceives that the legislative body has unintentionally omitted. *Department of Labor & Indus. v. Cook*, 44 Wn.2d 671, 269 P.2d 962 (1954). Furthermore, we cannot assume that the legisla-

tive body had in mind exceptions which it did not express when we have before us an act in which certain exceptions are clearly and concisely set forth. To use the venerable phrase, expressio unius est exclusio alterius. As expressed in more contemporary language in *State v. Roadhs*, 71 Wn.2d 705, 430 P.2d 586 (1967), affirmative specification excludes implication.

Public Law No. 83-280 clearly forbids a state to tax property held in trust for Indians over whom it assumes jurisdiction or to take other specified actions in relation to that property. The section protecting fishing, trapping and hunting rights would undoubtedly prohibit a tax or regulation which operated to deprive the Indian of those rights. But there is expressed in the act no other limitation upon the right of the state to impose taxes upon and regulate the activities of an Indian under its general laws applicable to all citizens. Under the rules of interpretation which we have stated, there is no room to imply other limitations upon the operation of the general laws of the state.

If there were any doubt in our minds that it was the intent of Congress to make all the laws of the state, with their benefits and their burdens, applicable to the consenting tribes and their members (with exceptions noted), that doubt would be resolved by an examination of the committee report upon which the Congress acted when it passed Public Law No. 83-280. We think the purpose is manifest in the language used in the act, giving it its ordinary and commonly understood meaning, and the record shows that the purpose expressed was indeed the purpose intended.

In Senate Report No. 699, which repeats in substance House Report No. 848 on House Resolution 1063 (which became Public Law No. 83-280), the following statement regarding the act and certain companion legislation appears:

> Your Committee on Interior and Insular Affairs, through its Indian Affairs Subcommittee, and with the continuing cooperation of the Secretary of the Interior and the Indian Bureau, has, during this session, operated in five major areas of legislation affecting the Indians. This legislation, whether before the House or presently under committee consideration, has two coordinate aims: First, withdrawal of Federal responsi-

> bility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such.

U.S.C. Cong. & Admin. News 2409 (1953).

The report drew attention to the fact that, owing to the lack of state jurisdiction to prosecute offenses and limitations upon the federal jurisdiction, as a practical matter enforcement of law within the reservation had been left largely to the Indian groups themselves, and that Indian tribes often are not sufficiently organized to preserve law and order on the reservation. The report said:

> [C]onsequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

U.S.C. Cong. & Admin. News 2412 (1953).

Upon the question of civil jurisdiction, the report stated:

> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.
>
> After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws.

U.S.C. Cong. & Admin. News 2412 (1953).

We cannot conceive that it was the intent of Congress to extend to Indians only the protection and benefits of state

laws, with none of their attendant duties and responsibilities, and we find no such intention expressed in the statute. True, there are certain immunities and protections afforded the Indians in the enjoyment of their trust properties and their rights of fishing, trapping and hunting. These place the Indian in a position of advantage not shared by other citizens.

This court has been liberal in its interpretation of the provision forbidding states which assume jurisdiction from placing burdens upon trust property. In *Snohomish County v. Seattle Disposal Co.*, 70 Wn.2d 668, 425 P.2d 22 (1967), we held that a zoning restriction could not be given effect to restrict the use of property upon which there was a restraint against alienation, even though that property had been leased to nonIndians.

The Supreme Court of the United States has not gone so far in protecting allotted and restricted lands from encumbrance. In *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L. Ed. 721, 69 S. Ct. 561 (1949), it held that the interests of nonIndian lessees in such lands were subject to state gross production taxes on petroleum produced from such lands, overruling a number of cases which had held to the contrary and reaffirming *Thomas v. Gay*, 169 U.S. 264, 42 L. Ed. 740, 18 S. Ct. 340 (1898), wherein the court had sustained a state tax on cattle grazing on tribal lands leased from Indians by the nonIndian owner of the cattle. The court found that any burden upon the land resulting from such a tax was too remote to justify a rule which would aid the lessee in escaping a nondiscriminatory tax to which he would otherwise be subject and thus to thwart the taxing power of the state.[2]

The court quoted with approval the following excerpt from *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 82 L. Ed. 907, 58 S. Ct. 623 (1938), wherein it noted the supposed truism that the power to tax is the power to

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2. We dealt with a question concerning the imposition of the tax on wholesalers in *Makah Indian Tribe v. Tax Comm'n*, 72 Wn.2d 613, 434 P.2d 580 (1967), and reached a result in harmony with that of the United States Supreme Court in *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L.Ed. 721, 69 S.Ct. 561 (1949). Note that there was no showing in that case that the Makahs submitted to the jurisdiction of the state under RCW 37.12.021, as authorized by Public Law No. 83-280.

destroy,[3] and said:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government.' *Willcuts v. Bunn*, 282 U.S. 216, 225, and illustrations there cited." 303 U.S. at 385.

336 U.S. at 361.

This opinion of the United States Supreme Court would indicate that that court now entertains a liberal view with respect to the taxing power of states, but the plaintiff calls our attention to *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242 (1965), wherein the court held that the State of Arizona could not impose an excise tax upon a federally-licensed Indian trader based upon the gross proceeds of sales upon the reservation of the Navajo Indians. The plaintiff relies heavily upon this case and contends that it stands for the proposition that Congress has preempted the field of Indian trading, leaving no room for state regulation or imposition of state taxes.

The facts of that case, however, are so different in material aspects from the facts of this case that the law enunciated therein has no application here. There, the company upon which the tax was sought to be imposed had been licensed by the Commissioner of Indian Affairs to trade with the Indians. Here, the plaintiff holds no such license.[4] Furthermore, admittedly, the bulk of his trade is with non-Indians. Thus, the state tax does not interfere with a federal licensing policy as it did in the Arizona case.

3. The opinion recalls the words of Mr. Justice Holmes in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L.Ed. 857, 48 S.Ct. 451, 56 A.L.R. 583 (1928), "The power to tax is not the power to destroy while this court sits."

4. We are advised by counsel for the Washington State Department of Revenue that the Commissioner has never exercised the power given by 25 U.S.C. § 261 (1876) to license Indian traders in this state, and the plaintiff has not questioned the accuracy of his statement.

However, we do not rely upon this distinction as the basis for our decision. Rather, the most important distinguishing feature is that the Navajo Indians of Arizona had not submitted themselves to the jurisdiction of the state, and the state had not assumed such jurisdiction. The court said:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.

380 U.S. at 690.

Observing that Congress had evidenced a purpose of ensuring that no burden should be imposed upon Indian traders for trading with Indians on reservations except as authorized by acts of Congress or by valid regulations promulgated under those acts, the court said that the tax in question would put financial burdens upon the trader or the Indians with whom he traded in addition to those Congress or the tribes had prescribed, and could thereby disturb the statutory plan for insuring that the prices paid by the Indians were fair. The court continued:

> And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

(Footnote omitted.) 380 U.S. at 691.

Implicit in this language is a declaration that, had the Congress placed duties upon the state or authorized it to assume duties with respect to the Indians and had the state assumed such duties, a different result would have been indicated.

Here, the Congress has not only failed to preempt the field of Indian trading but it has authorized the state to assume jurisdiction over such trading; the Colville tribe has requested that the state assume such jurisdiction, and the state has accepted the responsibility. Unlike Arizona, the State of Washington does indeed have duties to perform for the Colville Indians. These Indians now enjoy all the rights and privileges which are enjoyed by citizens generally. They have the protection of all the state's criminal laws and the services of its courts and all of the benefits

to which other citizens similarly situated are entitled under its civil laws.

It was the purpose of the Congress in enacting Public Law No. 83-280 to release from federal supervision and protection those Indians who wish to be released, except in the areas expressly reserved in the act, and to subject them instead to the jurisdiction of the states. It was the evident purpose of Congress to facilitate the emergence of the Indian from his inferior status as a protected (but nevertheless disadvantaged) ward of the federal government to the status of full citizen, both of the state in which he resides and of the United States, with all of the privileges and responsibilities of such status.

It is suggested by the plaintiff that the regulating and taxing of his sales of cigarettes by the state interferes with tribal government. There is no showing of any actual conflict between the state laws and tribal laws, but if there were such a conflict, the state law would, under Public Law No. 83-280, be controlling. That act provides that only such tribal customs and ordinances as are not in conflict with state laws are to be preserved.

The plaintiff in this case has entered into the commercial life of the community in which he lives. He sells a product manufactured by others, the sale of which the state has found it desirable and necessary to regulate. The plaintiff does not question the right of the state to impose a tax upon the sale of cigarettes generally. But he contends that he should be exempt from the duty of collecting and remitting that tax and should thus enjoy a competitive advantage over nonIndian sellers of cigarettes. He has cited no authority which supports this proposition.

We are convinced that, when Congress enacted Public Law No. 83-280, authorizing the states to assume jurisdiction over Indian tribes and their members and providing that, after such assumption the civil laws of the state should apply to the Indians on the reservations the same as to others, it intended that the only exceptions to the operation of those laws should be those enumerated in the act. The plaintiff's business activities do not fall among those exceptions.

The judgment is affirmed.

HAMILTON, C.J., FINLEY, HALE, NEILL, SHARP, and WRIGHT, JJ., and RYAN and MIFFLIN, JJ. Pro Tem., concur.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

LEONARD TONASKET, *Plaintiff*, v. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Defendants.*	No. 38791 Memorandum Opinion

This matter came on for trial with the Plaintiff seeking a declaratory judgment as against the state of Washington and the Tax Commission and seeking to enjoin the state of Washington from interferring [sic] with the Plaintiff in the selling of cigarettes at retail. The Plaintiff was represented by his attorney, Mr. B. E. Kohls and the defendant was represented by its attorney, Mr. J. Richard Duggan, Assistant Attorney General. After taking testimony and hearing the arguments of counsel, and receiving briefs of the parties, the Court took the matter under advisement. Subsequently, it was called to the attention of the Court that an opinion has been rendered by the supreme court in the case of the *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 683. The Court called this matter to the attention of counsel as to whether they wished to submit additional briefs. Additional breifs [sic] were submitted. The Court has considered the testimony, the arguments and the briefs.

The Court does not feel that there is any necessity of reiterating the facts in this case as there appears to be no conflict or dispute as to the facts and the Court is satisfied that the Plaintiff is a member of the Colville Confederated Tribes. The Plaintiff has gone to great lengths in arguing and submitting his briefs to cover the law relating to taxation of Indians on Indian reservations and cites the leading case of *Warren Trading Post Co. v. Arizona Tax Commission*, 1965 Arizona, 85 S. Ct. 1242, 380 U. S. 685, 14 L. ed [sic] 2d 165, in which the Supreme Court of the United States held that under the commerce clause of the United

States Constitution, being Article I, Section 8, Clause 3, Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders in the form of taxes. The Plaintiff further cites the case of *Makah Indian Tribe v. Tax Commission*, 72 Wn. 2d 608 and also *Makah Indian Tribe v. Clallam County*, 73 Wn. 2d 683 as additional authorities.

The Court is familiar with *Makah Indian Tribe v. Tax Commission, supra,* in that this Court was the judge originally hearing that case.

While these cases undoubtedly point out the law governing in those situations, there is one additional fact found here that must be taken into consideration by the Court and that is that the Colville Confederated Tribes of the state of Washington have accepted the civil and criminal jurisdiction of the state of Washington under the provisions of Chapter 37.12 RCW and under the provisions of Public Law 280, 83rd Congress and the actual question for the Court to determine, is whether the United States government under the provisions of Public Law 280 of the 83rd Congress has relinquished to the states the right to impose the excise taxes as to the sale of cigarettes and has taken away from the Indians protection granted them under the *Warren Trading Post Co. v. Arizona Tax Commission* case, *supra.*

In examining the legislation of the state of Washington, implementing Public Law 280 of the 83rd Congress, the Court finds that in RCW 37.12.060 limitations on the application of the acceptance of civil and criminal jurisdiction of the Indian tribes were laid out in detail and actually is verbatim the limitations set down by Public Law 280 of the 83rd Congress and the Court doesn't find in these statutes any direct limitation on the imposition of an excise tax as complained of herein. RCW 37.12.060 provides that there shall be no taxation of any real or personal property, including water rights and tide lands, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or subject to restriction against alienation imposed by the United States. The Court is satisfied, as argued by the Defendant, that if it was not intended to transfer the power to tax to the state, there

would have been no necessity of mentioning the term "taxation" within the exclusionary provision of RCW 37.12.060 and Public Law 280, *supra*. The Court is of the opinion that the taxation which had been imposed by the state in this case, has not been limited by the provisions of RCW 37.12.060 or by 28 USCA 1360 in sub-section (b) thereof.

In conclusion, the Court is of the opinion that, while the law as cited by the Plaintiff is controlling as to those Indian tribes which have not allowed the assumption of criminal and civil jurisdiction by the state of Washington, in those cases where civil and criminal jurisdiction has been accepted by the state of Washington, the members of the Indian tribes therein are subject to the excise taxes complained of by the Plaintiff herein and the state may further enforce the criminal laws of the state relating to the possession of unstamped cigarettes.

The Plaintiff has further asked for declaratory judgment enjoining the state and requesting a restraining order against the state interferring [sic] with the possible potential sale by the Plaintiff of intoxicating liquor and the Court sees no reason why the opinion of the Court should not apply equally as well to the sale of intoxicating liquor.

The Court will sign Findings of Fact, Conclusions of Law and Judgment in accordance with the terms of this memorandum opinion.

DATED this 7th day of October, 1968.

s/ HEWITT A. HENRY
Hewitt A. Henry, Judge

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON
THURSTON COUNTY NO. 38791

LEONARD TONASKET, *Appellant,* v. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Respondents.*	REMITTITUR No. 41640 Thurston County No. 38791

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on September 2, 1971, became the final judgment of this court in the above entitled case on November 15, 1971. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Two hundred eighty-five and 50/100 ($285.50) in favor of respondent and against appellant and against United Pacific Insurance Co.

The Petition for Rehearing was denied by order dated November 15, 1971.

cc: Ziontz, Pirtle & Fulle
Mr. Robert L. Pirtle and Mr. Mason D. Morisset
Honorable Slade Gorton, Attorney General
Mr. Michael B. Hansen, Asst.
Mr. Timothy R. Malone, Asst.
Court Reporter

IN TESTIMONY WHEREOF, I have hereunto set my hand affixed the seal of said Court at Olympia, this 15th day of November, A.D. 1971.

WILLIAM M. LOWRY
Clerk of the Supreme Court, State of Washington.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEONARD TONASKET, *Appellant*, v. THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Appellees.*	No. 41640 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Leonard Tonasket, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington entered November 15, 1971 affirming the judgment of the Superior Court for Thurston County, Washington, Cause No. 38791, signed and entered by the Honorable Hewitt A. Henry on January 21, 1969.

This appeal is taken pursuant to 28 U.S.C. §1257.

2. The Clerk will please prepare and certify a transcript of the entire record in this action, including appellant's Supplemental Statement of Additional Authorities, Brief and Petition in Support Thereof, for Rehearing, for transmission to the Clerk of the Supreme Court of the United States.

3. The questions presented by this appeal are:

(a) Whether Titles 82.24, 82.32 and 19.91 of the Revised Code of Washington providing for licensing and taxation of retail cigarette sellers and sales are repugnant to and in conflict with the Federal Indian Trader Act, 25 U.S.C. §261, *et seq.*

(b) Whether the authority granted to states by Public Law 83-280, Ch. 505, 67 Stat. 588 to allow assumption of criminal and civil jurisdiction over Indian reservations repeals by implication all

previous federal statutes, laws and treaties governing Indian affairs.

(c) Whether in light of applicable federal statutes and laws Public Law 83-280, Ch. 505, 67 Stat. 588, extends to the State of Washington power to tax and regulate retail sales on an Indian reservation.

DATED this 8th day of December, 1971.

ZIONTZ, PIRTLE & MORISSET
ROBERT L. PIRTLE
MASON D. MORISSET

By: s/ROBERT L. PIRTLE
Robert L. Pirtle
Attorneys for Leonard Tonasket, Appellant.

PROOF OF SERVICE

I, PAMELA D. CLERICO, a secretary in the office of Ziontz, Pirtle and Morisset, depose and say that on the 8th day of December, 1971, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the appellees herein: STATE OF WASHINGTON and the SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, by depositing copy thereof addressed to the Attorney General of the State of Washington, Temple of Justice, Olympia, Washington (98501), attorney of record for appellees, in a United States Post Office mailbox in Seattle, King County, Washington, with first-class postage prepaid thereon.

s/ PAMELA D. CLERICO
Pamela D. Clerico

SUBSCRIBED and SWORN to before me this 8th day of December, 1971.

s/ ROBERT L. PIRTLE
Robert L. Pirtle
Notary Public in and for the State of Washington, residing at Bainbridge Island.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provision:

United States Constitution, Art. I §8, cl. 2

"The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

25 U.S.C. §§261-264:

§261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, §5, 19 Stat. 200.

§262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, §1, 31 Stat. 1066; Mar. 3, 1903, c. 994, §10, 32 Stat. 1009.

§263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. §2132.

§264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person, shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commission of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. 2133; July 31, 1882, c. 360, 22 Stat. 179.

Public Law 83-280, 67 Stat. 588 (1953).

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2, Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or

against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3 Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or com-

munity in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

Federal Regulations:

25 C.F.R. §251, §253:

§251.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§251.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs. (R.S. 2133, as amended; 25 U.S.C. 264.)

25 C.F.R. §91.12, 91.13:

§91.12 Tribal funds.

(a) Tribal funds may be advanced to corporations and unincorporated tribes and bands, when authorized by Congress, upon request of the governing body and approval by the Commissioner, for the establishment of enterprises and for relending in accordance with paragraphs (b) and (c) of this section and § 91.13. No interest shall be paid to the United States on such funds.

(b) Support loans may be made to old, indigent, or disabled members, and loans may be made for burial expenses of members, when there is reasonable assurance that the loans will be repaid. Interest may be waived on such loans.

(c) Individuals need not be of at least one-quarter degree of Indian blood in order to receive loans of tribal funds, but must be members of the corporation, tribe, or band to which the funds belong.

(d) Failure of a corporation or unincorporated tribe or band to use tribal funds advanced under authority of paragraph (a) of this section in accordance with the regulations and the purposes for which requested, shall be grounds for any one or all of the following steps to be taken by the Commissioner:

(1) Discontinue further advance of funds requested.

(2) Require that the entire amount advanced be returned to the Treasury.

(3) Prevent further disbursement of tribal funds under the control of the corporation, tribe, or band.

(4) Withdraw any unobligated funds from the corporation, tribe, or band and deposit the same in the Treasury.

(5) Require that all repayments on loans made by the corporation, tribe, or band, be used to replace funds advanced to the corporation, tribe, or band from the Treasury.

(6) In the case of enterprises operated with tribal funds, to liquidate or operate or arrange for the operation of the enterprise, until all tribal funds advanced to the corporation, tribe, or band have been replaced in the Treasury, or until the Commissioner has received acceptable assurance that the funds will be replaced, or that the enterprise will be operated in a manner satisfactory to him.

§91.13 Relending by borrower.

(a) Funds loaned by the United States to a corporation, tribe, band, or credit association, may be reloaned by it, with the approval of the Commissioner or his authorized representative, but the Commissioner may authorize such lenders to approve applications for particular types of loans up to a specified amount.

(b) Such loans shall be secured by such securities as the lender and the approving officer may require. Individually owned trust or restricted land may be mortgaged for such loans in accordance with § 121.52 of this chapter. All securing documents shall be filed or recorded in accordance with State or Territorial law.

(c) Unless otherwise authorized by the Commissioner in the case of particular loans, title to property purchased with such loans received from such relending organizations shall be taken in the name of the borrower.

Executive Order:

Executive Order Dated July 2, 1872

EXECUTIVE MANSION
Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT

State Statutes:

Revised Code of Washington:

82.24.050 Duty of retailer

Every retailer shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided*, That those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations, without affixing the stamps required by this chapter. [Amended by Laws 1st Ex Sess 1969 ch 214 § 2.]

82.24.110 Other offenses—Penalty. Each of the following acts is a gross misdemeanor and punishable as such:

(1) To sell, except as a registered wholesaler or retailer engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;

(2) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;

(3) For any person other than the tax commission or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(4) To violate any of the provisions of this chapter;

(5) To violate any lawful rule or regulation made and published by the tax commission;

(6) To use any stamps more than once;

(7) To refuse to allow the tax commission or any duly authorized agent thereof, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;

(8) For any retailer, except one permitted to maintain an unstamped stock to engage in interstate business as provided herein, to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached;

(9) For any person to make, use, or present or exhibit to the tax commission or any duly authorized agent thereof, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;

(10) For any wholesaler or retailer or his agents or employees to fail to produce on demand of the tax commission all invoices of all the articles herein taxed or stamps bought by him or received in his place of business within five years prior to such demand unless he can show by satisfactory proof that the non-production of the invoices was due to causes beyond his control;

(11) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein.

All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses herein described shall be guilty and punishable as principals, to the same extent as any wholesaler or retailer violating the provisions thereof.

82.32.030 Registration certificates. If any person engages in any business or performs any act upon which a tax is imposed by the preceding chapters, he shall, whether taxable or not, under such rules and regulations as the commission shall prescribe, apply for and obtain from the commission, upon payment of a fee of one dollar, a registration certificate. Such registration certificate shall be personal and nontransferable and shall be valid as long as the taxpayer continues in business and pays the tax accrued to the state. In case business is transacted at two or more separate places by one taxpayer, a separate registration certificate for each place at which business is transacted with the public shall be required, but, for such additional certificates no fee shall be required. Each certificate shall be numbered and shall show the name, residence, and place and character of business of the taxpayer and such other information as the tax commission deems necessary and shall be posted in a conspicuous place at the place of business for which it is issued. Where a place of business of the taxpayer is changed, the taxpayer must return to the commission the existing certificate, and a new certificate will be issued for the new place of business free of charge. No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section, except that the commission, by general regulation, may provide for the issuance of certificates of registration to temporary places of business without requiring the payment of any fee.

82.32.210 Tax warrant—Levy upon property—Revocation of certificate of registration

If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the tax commission may issue a warrant under its official seal directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of such warrant, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant, plus the cost of executing the warrant, and return the warrant to the commission and pay to it the money collected by virtue thereof within sixty

days after the receipt of the warrant. If, however, the commission believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the tax or penalty to be immediately due and payable and may issue a warrant immediately.

If any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of the superior court, or if any taxpayer shall, for three consecutive reporting periods, be delinquent in the transmission to the commission of retail sales tax collected by him, the tax commission may by order issued under its official seal, revoke the certificate of registration of the taxpayer against whom the warrant was issued, and, if such order is entered, a copy thereof shall be posted in a conspicuous place at the main entrance to the taxpayer's place of business and shall remain posted until such time as the warrant has been paid. Any certificate so revoked shall not be reinstated, nor shall a new certificate of registration be issued to the taxpayer, until the amount due on the warrant has been paid, or provisions for payment satisfactory to the commission have been entered, and until the taxpayer has deposited with the commission such security for payment of any taxes, increases, and penalties, due or which may become due in an amount and under such terms and conditions as the commission may require, but the amount of the security shall not be greater than one-half the estimated average annual liability of the taxpayer. [Amended by Laws 1st Ex Sess 1967 ch 89 §3, effective June 1, 1967.]

82.32.240 Tax constitutes debt — Priority of Lien. Any tax due and unpaid and all increases and penalties thereon, shall constitute a debt to the state and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies.

In all cases of probate, insolvency, assignment for the benefit of creditors, or bankruptcy, involving any taxpayer, the claim of the state for said taxes and all increases and penalties thereon shall be a lien upon all real and personal property of the taxpayer, and the mere existence of

such cases or conditions shall be sufficient to create such lien without any prior or subsequent action by the state, and in all such cases it shall be the duty of all administrators, executors, guardians, receivers, trustees in bankruptcy or assignees for the benefit of creditors, to notify the tax commission of such administration, receivership or assignment within thirty days from the date of their appointment and qualification.

The lien provided for by this section shall attach as of the date of the assignment for the benefit of creditors or of the initiation of the probate, insolvency, or bankruptcy proceedings: *Provided*, That this sentence shall not be construed as affecting the validity or priority of any earlier lien that may have attached previously in favor of the state under any other section of this title.

Any administrator, executor, guardian, receiver or assignee for the benefit of creditors not giving the notification as provided for above shall become personally liable for payment of the taxes and all increases and penalties thereon.

82.32.290 Unlawful acts—Penalties. It shall be unlawful for any person to engage in business without having obtained a certificate of registration as provided herein; or to engage in business after his certificate of registration has been revoked by order of the tax commission; or to tear down or remove any order or notice posted by the commission; or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof; or for any person to aid or abet another in any attempt to evade the payment of such tax or any part thereof; or for the president, vice president, secretary, treasurer, or other officer of any company to make or permit to be made for any company any false return, or any false statement in any return, with intent to evade payment of any tax hereunder; or for the president, vice president, secretary, treasurer, or other officer of any company to carry on the business of any company which has not obtained a certificate of registration or whose certificate of registration has been revoked by order of the commission; or for any purchaser to fraudulently sign a resale certificate without intent to resell the property purchased; or for any person to fail

or refuse to permit the examination of any book, paper, account, record, or other data by the commission or its duly authorized agent; or to fail or refuse to permit the inspection or appraisal of any property by the commission or its duly authorized agent; or to refuse to offer testimony or produce any record as required.

Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor.

In addition to the foregoing penalties, any person who knowingly swears to or verifies any false or fraudulent return, or any return containing any false or fraudulent statement with the intent aforesaid, shall be guilty of the offense of perjury in the second degree; and any company for which a false return, or a return containing a false statement, as aforesaid, is made, shall be punished, upon conviction thereof, by a fine of not more than one thousand dollars. All penalties or punishments provided in this section shall be in addition to all other penalties provided by law.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

AMICI CURIAE BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON; SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON; MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON; SKOKOMISH INDIAN TRIBE OF THE SKOKOMISH INDIAN RESERVATION, WASHINGTON; CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, WASHINGTON; NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY INDIAN RESERVATION, WASHINGTON; AND SQUAXIN ISLAND TRIBE OF THE SQUAXIN ISLAND INDIAN RESERVATION, WASHINGTON

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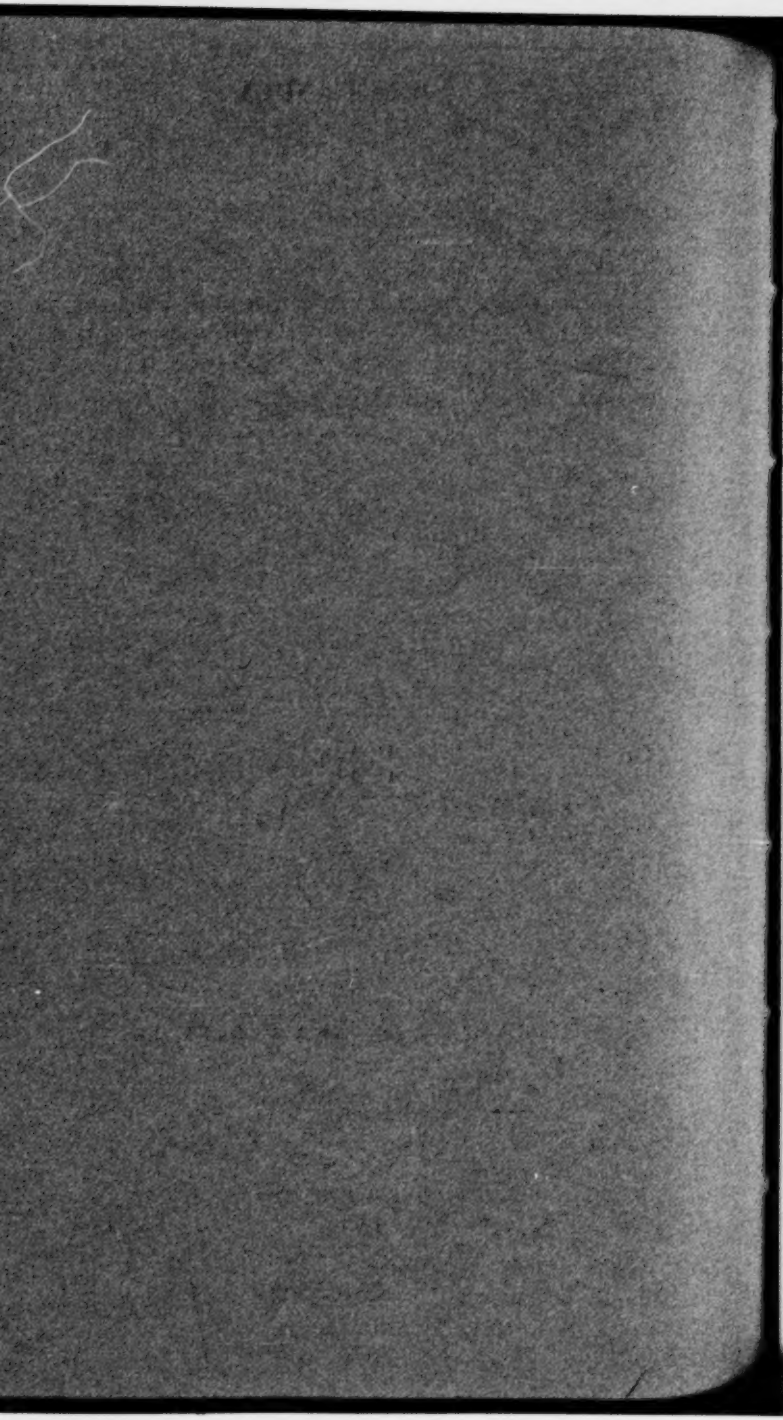

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The following named Indian tribes join in this *amicus curiae* brief in support of the appeal to the United States Supreme Court in this case.

INTEREST OF *AMICI CURIAE*

All of the *amici* are recognized Indian tribes whose reservation lands are located within the State of Washington. All of the tribes are subject to state civil and crim-

inal jurisdiction by reason of Public Law 83-280. There are other Indian tribes in the state which are subject to partial state jurisdiction, whose interests may not be directly affected. But for those tribes which accepted state jurisdiction, and that includes all of the *amici*, the ruling of the Washington State Supreme Court in this case presents a most serious invasion of their rights as Indian tribes under the treaties and laws of the United States.

In particular, *amici* are concerned that if the state court decision here is allowed to stand, they will find that all of their property which is not actually held in trust by the United States Government will now be made the object of state taxation. Certainly, the state authorities will seek to collect retail sales taxes on sales made to or by Indians on their own reservation lands. This will strike a cruel blow at Indian tribes, because poverty is endemic on Washington State Indian reservations as elsewhere, and the Washington state sales tax which applies to food, medicine and clothing hits poor people hardest. (The sales tax is contained in the Revised Code of Washington, Chapter 82.08.)

In addition, all of the other excise taxes will fall on Indian businessmen and consumers alike, directly affecting the economy of the tribes and their ability to regulate and assist in the economic development on their own reservations, and impairing the efforts of both the tribes and the federal government to change for the better the material life of Indian people.

QUESTIONS PRESENTED

The ultimate question presented in this case may be stated as follows: Where an Indian tribe in the State of Washington is subject to maximum state jurisdiction under Public Law 83-280, may the State tax all Indian personal property and transactions on Indian reservation lands except those items of property held in actual federal trusteeship?

ARGUMENT

I.

Imposition of State Taxing Authority on Indians Infringes on the Federal Trust Responsibility to Indian Property

State excise taxes extend over the entire range of Indian commerce. They include all retail sales (RCW 82.08), the conduct of all forms of business and manufacture (RCW 82.04), additional sales taxes on such specific property as cigarettes (RCW 82.24), other tobacco products (RCW 82.26), and motor vehicle fuel (RCW 82.36), and cover numerous other subject areas. These taxes are enforced under state law by criminal penalties (RCW 82.32.290) and by civil remedies. RCW 82.32.210 gives the State power to:

> "... levy upon and sell the real and/or personal property of the taxpayer found within his county or so much thereof as may be necessary, for the payment of the amount of such warrant ..."

In addition, state law also gives the State the right to impose a lien upon the probate of a deceased taxpayer for taxes upon the filing of a claim. This is stated in RCW 82.32.240, which provides that such lien shall be:

> "... upon all real and personal property of the taxpayer ..."

It is well established that the federal government is precluded from exacting income taxes from Indians derived from trust property because of the likelihood that income taxation could constitute a charge or encumbrance on trust property. *Squire v. Capoeman*, 351 U.S. 1 (1956). See also the recent decision in *Stevens v. Commissioner of Internal Revenue*, ...F.2d ..... (November 26, 1971).

Where the United States is precluded from taxing Indians for income derived from their own trust property because the encumbrance the tax could create upon such property is contrary to the guarantee of the United States to ensure that trust property shall be free of encumbrance, surely the State may not tax Indians for property used on or activities conducted on their trust lands where such power of taxation carries with it the direct threat of encumbrance of trust lands and property.

It must also be noted that the State tax laws give the State lien rights as to probate proceedings, and a serious question would be presented if such a lien claim were made in the estate of an Indian to whom an allotment of land had been made. Such proceedings are governed by 25 U.S.C. §372, §373, §373(a), §373(b), §374, and §377. The Secretary of Interior has promulgated regulations governing the administration of estates of Indians which are found in 25 C.F.R. Part 15. Under 25 C.F.R. 15.25, priority of claims is set forth and provides that claims of general creditors are to be allowed after claims of indebtedness to the tribe and after claims of indebtedness to the United States or any of its agencies. Further, Section 15.25(c) provides that no claims of general creditors shall be allowed if the value of the estate is $1,500 or less and the

decedent is survived by a spouse or by one or more minor children.

Under *Squire v. Capoeman, supra,* and *U.S. v. Rickert,* 188 U.S. 432 (1903), state tax laws cannot be permitted to affect this federally pre-empted area.

II.

Extension of State Excise Taxes to Indians and Their Property Contravenes Public Law 83-280

Public Law 83-280 carefully reserved out of the transfer of jurisdiction to states any subject area which would be construed to authorize:

> "... alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in any manner inconsistent with any federal treaty, agreement or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate in probate proceedings or otherwise, the ownership or right to possession of any of such property or any interest therein."

As discussed in the preceding section of this brief, state tax laws by their very terms invade the area reserved by Public Law 83-280 to federal jurisdiction. Public Law 83-280 is no warrant to the states to extend taxation over Indian property on their reservations, or Indian business transactions on Indian reservations where the effect could be to create an encumbrance upon Indian trust property. Obviously, state tax authority could not be sustained on the ground that it was based upon non-trust property or transactions, where collection measures would necessarily involve liens or encumbrances on trust property.

An examination of the history of Public Law 83-280 should make it clear that Congress had no intention of dismantling the entire structure of Indian tax immunity in the enactment of Public Law 83-280. Certainly, the tribes which asked for state jurisdiction had no such understanding of the effects of this law. If such effect is to be given to it, it should be based only upon the clearest expressions of statutory authority by the Congress. In fact, the Congress has expressed its intention contrarily in excepting from the operation of the Act anything which could create encumbrances or taxation on Indian property. See 59 Cal. L. Rev. 1261.

III.

State Taxation of Indian Property and Transactions on Indian Reservations is Barred Because of Federal Pre-Emption

Nothing could be more clear than the federal preemption of the field of Indian commerce. The authority to regulate Indian commerce is placed in the Congress by Article I, section 8, clause 3 of the United States Constitution:

> "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . ."

This power has been described as "paramount and of a most sweeping character." *People ex rel. Ray v. Martin*, 294 N.Y. 61; 60 N.E.2d 541 (1945), *aff'd* 326 U.S. 496 (1946).

Congress has exercised its authority to regulate such commerce. 25 U.S.C. §2 provides:

> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agree-

> ably to such regulations as the President may prescribe, have the management of *all* Indian affairs and of *all matters* arising out of Indian relations."

The Secretary has in fact undertaken broad management and control of Indian affairs. See 25 C.F.R. Congress has further specifically acted in the area of Indian commerce in enacting 25 U.S.C. §261 *et seq.*, the Federal Traders Act. This Act authorizes full blood Indians to conduct businesses on reservations without federal license, but reserves to the Commissioner of Indian Affairs exclusive authority to license all other persons to conduct such business and:

> "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

The U. S. Supreme Court has ruled that this constitutes federal preemption of Indian commerce in *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685 (1965). The basic policy which the U.S. Supreme Court was concerned to protect was the placement of financial burdens upon the businessmen doing business on the reservation, or upon the Indians with whom he deals.

The federal interest in Indian affairs has, if anything, grown far more pervasive since the decision of this court in the *Warren* case in 1965. The court may take judicial notice of the many programs and policies promulgated by the Congress and agencies of the federal government to improve the material conditions of life on Indian reservations in the United States. Extension of state tax authority over all Indian property and transactions runs directly counter to the federal interest in this area. It would im-

pose new burdens on Indians attempting to engage in businesses and would penalize those Indians who avail themselves of tribal or federal loan programs to start businesses upon their reservations.

It is well-established both by *Warren Trading Post v. Arizona Tax Commission, supra,* and by *U. S. v. Rickert, supra,* that a state tax will not be permitted to invade an area which is federally reserved and where the United States has acted to carry out its authority and responsibility in the area.

IV.

If Public Law 83-280 is Construed to Authorize State Regulation of Indian Commerce, then the Act Must Be Found Unconstitutional Under the United States Constitution

Under Article I, section 8, clause 3, exclusive power to regulate Indian commerce is placed in the Congress. It is significant to note that Congressional authority over Indian commerce is contained in the same phrase which gives the Congress authority over foreign commerce and interstate commerce.

It would contravene the express provisions of the commerce clause for a federal statute to be construed as transferring to a state the power reserved to the Congress. No more could this be done constitutionally than transfer to a state of power to regulate any portion of foreign commerce or interstate commerce.

It is elementary that a law must not be construed as contravening constitutional provisions if such a construction can be avoided. Clearly, allowing the decision of the Washington State Supreme Court to stand in this case

would result in leaving the State with power constitutionally reserved to the United States Congress.

V.

Imposition of State Taxes on Indian Property and Transactions on Indian Reservations Constitutes an Illegal Interference with Tribal Sovereignty

The inherent sovereign authority of Indian tribes has been recognized and protected by the courts since the decision of this court in *Worcester v. Georgia*, 6 Peter (U.S.) 515, 558-61, one hundred forty years ago.

Included among these inherent sovereign powers is the tribal power to tax businesses conducted upon the reservation of the tribe. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89, 96; *Buster v. Wright*, 135 Fed. 947 (1905). The imposition of an entire state tax structure on Indian businessmen and Indian consumers on an Indian reservation clearly impairs, if not totally displaces, the tribal taxing authority.

It seems that the state may have a twofold interest in attempting to extend its taxes to such transactions: first, the all-pervading desire to increase state revenues, and second, an effort to prevent Indian businessmen and their customers from obtaining any competitive advantages over non-Indian businesses located in adjacent communities. The ultimate effect of such tax equalization is to protect merchants in adjacent communities from loss of Indian business due to tax advantages.

VI.

Imposition of State Tax Law is a Violation of the Basic Treaty Undertaking Between the United States and the Tribes

Many of the Washington State tribes are parties to treaties negotiated in 1854 and 1855, such as the Treaty of Point Elliot, January 22, 1855, 12 Stat. 927. (Including *amici curiae* Suquamish and Muckleshoot Tribes). The pattern of this treaty is common to the Northwest. Article I of the treaty declares that all of the tribes party thereto ceded to the United States all of their right to their land and their country. Article II of the treaty declared that the tribes reserved lands for their exclusive use. The remaining articles recited the obligations and commitments of the United States to the Indians and Article IX recited:

> "The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof . . ."

Therein is found the basic undertaking of the parties: land cession by the Indians, guarantees of security by the United States, and establishment of the dependency of the tribes on the United States on the one hand and the correlative responsibility of the United States to the tribes on the other.

This basic relationship is one between the tribes and the United States and must be construed liberally as the Indians understood it. Subsequent Acts of Congress should not lightly be construed as impairing such obligations. Clearly, under Article VI of the United States Constitution, no state law may be construed as superseding or impairing such obligation.

CONCLUSION

The decision of the Washington State Supreme Court in this case has construed an Act of Congress in such a manner as to raise serious questions as to the validity of a state law with respect to a federal statute, with respect to the United States Constitution and with respect to Indian treaties. The decision also raises a possible question as to the constitutionality of the federal act itself if it is to be given the effect which the State Supreme Court has given it. Therefore, we respectfully urge that the United States Supreme Court note probable jurisdiction in this case.

DATED February 10, 1972.

Respectfully submitted,

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON

SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON

MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON

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MOTION TO DISMISS

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Supreme Court, U. S.
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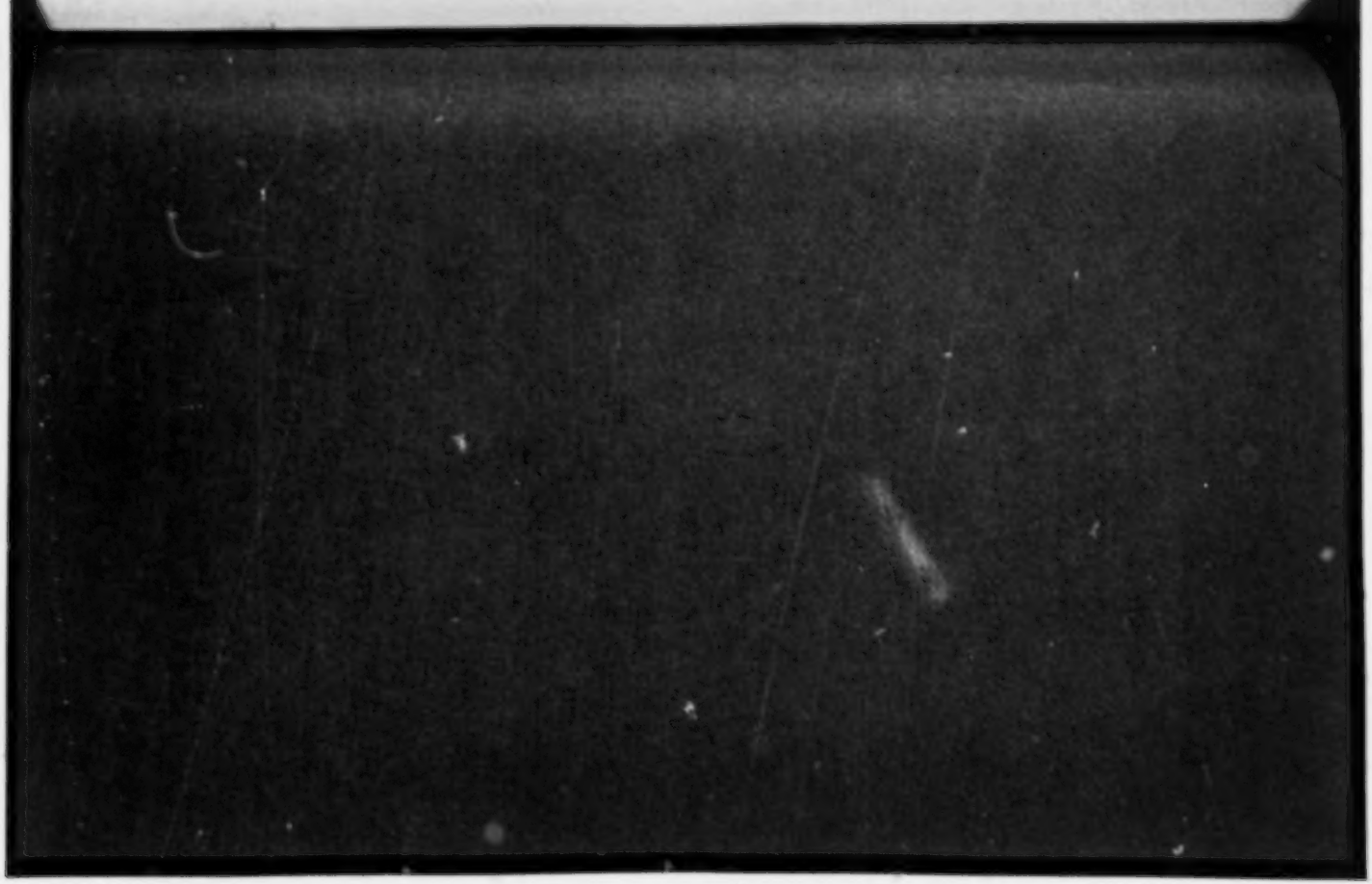

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1971
No. 71-1031

LEONARD TONASKET, *Appellant*,

v.

THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the appellees respectfully move that this Court enter an order dismissing the appeal on the ground that this case does not present a substantial federal question.

FACTS

Appellant is a full blood Colville Indian engaged in the business of selling cigarettes on the Colville Indian reservation (R. 23). Pursuant to authority granted by Congress in Public Law 83-

280, 67 Stat. 588) (Jur. St. E. 2), chapter 37.12 Revised Code of Washington, was enacted.

Thereafter, pursuant to the above statutes, the governing body of the Colville Confederated tribes did issue its Resolution 1965-4, requesting the Governor of the State of Washington, on behalf of the State of Washington, to assume full and complete civil and criminal jurisdiction over the Colville Confederated Tribes, its members and the lands held in trust for it and its members. This request was granted in a proclamation issued by the Governor of the State of Washington on January 29, 1965 (R. 23).

In the conduct of his business appellant has operated without the license required by RCW 19-.91.120, has not registered as a taxpayer with the State of Washington as required by RCW 82.32.030 nor paid any excise taxes to the State of Washington. He has not complied with the requirement of chapter 82.24 RCW which imposes upon cigarette retailers the duty of affixing stamps to cigarettes sold (R. 23; Jur. St. A-1).

QUESTION PRESENTED

Have the Colville Confederated Tribes of the State of Washington and its members, by accepting the criminal and civil jurisdiction of the state, authorized by Public Law 83-280, ch. 505, 67 Stat. 588, agreed to be bound by the state excise tax and licensing laws applicable to retailers of cigarettes?

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The clear, unmistakable language of Public Law 83-280 leaves no room for any conclusion other than that the foregoing question must be answered in the affirmative. The act reads:

> "SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> "SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (67 Stat. 588, 28 U.S.C.A. § 1360 (1964)).

It is perfectly obvious that the foregoing represented a basic policy change by the federal government insofar as state jurisdiction over Indians and

Indian land was concerned. Public Law 83-280 means exactly what it says and expresses congressional intent in unambiguous terms. We quote from the opinion of the Washington State Supreme Court (Jur. St. A-1):

> "In Senate Report No. 699, which repeats in substance House Report No. 848 on House Resolution 1063 (which became Public Law No. 83-280), the following statement regarding the act and certain companion legislation appears:
>
> > "Your Committee on Interior and Insular Affairs, through its Indian Affairs Subcommittee, and with the continuing cooperation of the Secretary of the Interior and the Indian Bureau, has, during this session, operated in five major areas of legislation affecting the Indians. This legislation, whether before the House or presently under committee consideration, has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such.
>
> U.S.C. Cong. & Admin. News 2409 (1953).
>
> "The report drew attention to the fact that, owing to the lack of state jurisdiction to prosecute offenses and limitations upon the federal jurisdiction, as a practical matter enforcement of law within the reservation had been left largely to the Indian groups themselves, and that Indian tribes often are not sufficiently or-

ganized to preserve law and order on the reservation. The report said:

> "[C]onsequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

U.S.C. Cong. & Admin. News 2412 (1953).

"Upon the question of civil jurisdiction, the report stated:

> "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.
>
> "After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation

> should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws.
>
> U.S.C. Cong. & Admin. News 2412 (1953)."

The basic premise of Public Law 83-280 permits the states to extend their civil and criminal laws, including tax laws, to Indians, with certain exceptions contained in section 2(b) (and in RCW 37.12.060), which have no application to this case.

The state of Washington's implementation of Public Law 83-280 came with the enactment of chapter 37.12 RCW. In discussing the effect of this chapter the court said in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (1966):

> "It was provided in this act, with exceptions not here relevant, that whenever the governor of the state shall receive from the tribal council or other governing body of any Indian tribe a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state, the governor shall issue a proclamation, after which the state shall assume such jurisdiction. Under this act, state jurisdiction thus extended to Indians and Indian lands was to be exerted *to the same extent as exerted elsewhere in the state.*"
>
> "* * *
>
> 'The scope of chapter 36 [the 1963 act] is summarized in our earlier opinion, opposite note 2. We do not read that act as constituting only a

partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation. In chapter 240, Laws of 1957, this Indian resolution and governor's proclamation procedure applied to all exertions of state jurisdiction.' " (pp. 657-8) (Emphasis supplied.)

An Indian subject to the state's jurisdiction is subject to the state's power to tax. "Jurisdiction" is authority to apply the law to the acts of men, *Wedding v. Meyler*, 192 U.S. 573, 48 L. Ed. 570, 24 S. Ct. 322 (1904). There is no limitation on that power, except such as may be expressed in Public Law 83-280 or chapter 37.12 RCW. No limitation is expressed or implied by either statute with respect to state excise taxes as distinguished from property taxes.

Speaking of Public Law 83-280, this Court said in *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L.Ed.2d 573, 82 S. Ct. 562 (1962):

> "In 1953 Congress granted to several states *full* civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future * * *. Thus Congress has to a substantial degree opened the doors of reservations to state

> laws, in marked contrast to what prevailed in the time of Chief Justice Marshall." (Emphasis supplied.)

See also *Williams v. Lee*, 358 U.S. 217, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959).

In an effort to bolster his position that a substantial federal question is presented by this appeal, appellant has given to the decision of the Washington State Supreme Court a broad interpretation which is entirely unwarranted by the facts and issue involved. That court correctly stated the single issue as follows:

> "The single question on this appeal is whether the Colville Confederated Tribes of the State of Washington and its members, by accepting the criminal and civil jurisdiction of the state, authorized by Public Law 83-280, ch. 505, 67 Stat. 588, have agreed to be bound by the particular statutes, the terms of which the plaintiff has admittedly violated."

The "particular statutes" referred to are the state's excise tax and licensing laws relating to the retail sale of cigarettes.

1. Appellant urges a substantial federal question on the ground that the state's tax laws may be enforced by levy and sale of real and personal property (Jur. St. 12). There is nothing in the record implying, nor has there been, any effort by the state to enforce collection of any tax against appellant or his property, whether held in trust or otherwise. The

decision of the court went no further than to hold that appellant was subject to the excise taxes in question. Whether certain collection procedures may or may not be used by the state under the authority of Public Law 83-280 is not an issue in this case. A tax may, in any event, be validly imposed and a lien attach, even though the tax cannot be collected or the lien enforced, *United States v. Alabama*, 313 U. S. 274, 85 L. Ed. 1327, 61 S. Ct. 1011 (1941).

2. Appellant seeks to have this Court assume jurisdiction by construing the state court's decision as holding that Public Law 83-280 impliedly repealed the Federal Indian Trader statutes (Jur. St. 12). There is no basis in fact for this assertion.

The effect of the Federal Indian Trader statutes, 25 USC §§ 261, *et seq.*, upon appellant's business activities and the issue relating to the possible repeal of those statutes by Public Law 83-280, were thoroughly presented to the state court (R. 124, 125). The state court simply held that the Indian Trader statutes had nothing to do with the question for decision.

In distinguishing *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685, 14 L. Ed.2d 165, 85 S. Ct. 1242 (1965), the Washington Court said:

> "* * * the most important distinguishing feature is that the Navajo Indians of Arizona had not submitted themselves to the

jurisdiction of the state, and the state had not assumed such jurisdiction. The court said:

> "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.

380 U.S. at 690.

"* * *

> "And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

(Footnote omitted.) 380 U.S. at 691.

> "Implicit in this language is a declaration that, had the Congress placed duties upon the state or authorized it to assume duties with respect to the Indians and had the state assumed such duties, a different result would have been indicated."

3. The appellant poses another question in his effort to sustain jurisdiction (Jur. St. 12). He assumes, without foundation, that the state court has decided Public Law 83-280 makes all state laws, except those expressly excluded, applicable to Indians. Appellant again loses sight of the issue in this case. It is apparent from reading the entire decision that the court was aware it was dealing only with cer-

tain state laws applicable to appellant's business activity of selling cigarettes at retail.

CONCLUSION

The three issues appellant has interjected have no validity, none of them present a substantial federal question in view of the plain, unambiguous terms of Public Law 83-280. The appeal should be dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1031

LEONARD TONASKET, APPELLANT

v.

THE STATE OF WASHINGTON ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of April 3, 1972, inviting the Solicitor General to express the views of the United States in this case.

The facts of the case are undisputed. Appellant is a Colville Indian of full blood, who owns a store on allotted land held in trust by the United States in the Colville Indian Reservation in the State of Washington. His customers are Indian and non-Indian, but the majority are non-Indian. In ap-

parent violation of state law, appellant did not obtain a license as a retailer of cigarettes nor affix state cigarette stamps to cigarettes he sold. In February 1967, agents of the State of Washington entered appellant's store, seized the cigarettes he had in stock and arrested him for violation of the state cigarette licensing and tax laws.[1] J.S. App. A, p. 1. Thereafter, appellant brought this suit for a declaratory judgment to establish his right to do business free of regulation or taxation by the State. The Supreme Court of the State of Washington, affirming the judgment of the trial court, held that the Colville Tribe, by submitting itself to the criminal and civil jurisdiction of the State of Washington as authorized by Public Law 280[2] and RCWA 37.12.021, subjected the Tribe and its members to state sales taxes and business regulations. J.S. App. A, p. 11.

1. Without the acquisition of criminal and civil jurisdiction under Public Law 280, it would be clear that the State could neither regulate nor tax sales by the appellant to Indians. The federal government has "exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes * * *," a control which precludes state regulation or taxation. *Warren Trading Post* v. *Tax Commission*, 380 U.S. 685, 686-691. See also 25 U.S.C. 261-264;

---

[1] RCWA 19.91.120; RCWA 82.32.030; RCWA 82.24.050.

[2] Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C. 1360. The Act is set forth at J.S. App. E, pp. 2-5.

25 C.F.R. 251.1-251.26.[3] The State's authority to tax or regulate appellant's trade with non-Indians would also be highly doubtful. Such regulation and taxation would not be prohibited because of federal preemption of the regulation of trade with Indians, but they would be of questionable validity because of several overlapping considerations: lack of state jurisdiction over Indian reservations (*Williams* v. *Lee*, 358 U.S. 217, 219-220; see also *Metlakatla Indians* v. *Egan*, 369 U.S. 45); interference with Indian self-government (*Warren Trading Post*, *supra*, 380 U.S. at 686-687)[4] and lack of state fiscal responsibility for Indian welfare (*id.* at 691-692).[5] See generally our memoranda in *Mescalero Apache Tribe* v. *Jones*,

---

[3] Because appellant is a full-blooded Indian, he cannot be required to have a license to trade with Indians, 25 U.S.C. 264. In recent years, the Commissioner of Indian Affairs, exercising his discretion, has not required anyone in the State of Washington to obtain a license to trade with Indians and has not subjected persons who trade with Indians in that State, to the regulations found in 25 C.F.R. 251. The statutory exemption from licensing for full-blooded Indians, and the exercise of the Commissioner's discretion for the State of Washington are, in our view, part of the congressional regulatory scheme controlling trade with Indians which this Court found preemptive of state jurisdiction in *Warren Trading Post*, *supra*.

[4] However, in *Warren Trading Post*, where the trader was a corporation rather than an Indian as here, the Court's holding was limited to exemption from state taxation "with respect to sales made to reservation Indians on the reservation * * *" (380 U.S. at 691-692).

[5] Another factor to be considered in appropriate circumstances is the trust status of the land that produced the income (see *Squire* v. *Capoeman*, 351 U.S. 1).

No. 71-738, certiorari granted April 24, 1972, and in *McClanahan* v. *Arizona State Tax Commission*, No. 71-834, certiorari granted May 15, 1972.

Whether Congress, in enacting Public Law 280, tacitly repealed the long-standing federal statutes and regulations governing trade with Indians insofar as they concern Indian lands over which a State assumes civil and criminal jurisdiction, is a question this Court has not yet decided. Similarly, the queston whether or to what extent the assumption of civil and criminal jurisdiction under Public Law 280 constitutes a grant to the State of taxing authority within Indian lands has not been settled and warrants the attention of the Court. These questions are recurrent. The answers are not clear. And a Tribe in choosing whether to permit a State to assume civil and criminal jurisdiction, or a State in deciding whether to retrocede jurisdiction pursuant to 25 U.S.C. 1323, should not be required to act in the dark as to tax consequences.[6]

2. Public Law 280 is entitled "An Act to confer jurisdiction * * * [on certain States] with respect

---

[6] At the time the State of Washington assumed civil and criminal jurisdiction within the Colville Reservation, no consent of the Tribe was required by federal legislation. However, state law (RCWA 37.12.021) did require tribal consent for a full assumption of jurisdiction within the confines of a reservation. Such consent was obtained in this case. J.S. App. A, pp. 4-5.

Federal law now requires consent of the tribe, obtained through a special election of its enrolled members, before a State may assume civil and criminal jurisdiction. Act of April 11, 1968 82 Stat. 78, 25 U.S.C. 1321, *et seq. Kennerly* v. *District Court of Montana*, 400 U.S. 423.

to criminal offenses and civil causes of action committed or arising on Indian reservations within such States * * *." The House Report on H.R. 1063, which became P.L. 280, speaks of the bill as part of a series of measures with two co-ordinate aims: withdrawing federal responsibility for Indians where practicable and terminating the subjugation of Indians to federal laws applicable to Indians as such. H. Rep. No. 848, 83d Cong., 1st Sess., p. 3; S. Rep. No. 699, 83d Cong., 1st Sess., p. 3.[7] Some of the measures proposed to achieve these aims were the complete termination of federal responsibility over certain Indian tribes, including distribution of tribal funds and disposition of trust property; the termination of federal services for Indians; and provision for the issuance of certificates of competency to Indians allowing them to withdraw from tribes and receive a share of tribal property. H. Rep., *supra*, pp. 3-5; S. Rep., *supra*, pp. 2-3. However, H.R. 1063 itself was not termination legislation and was presented as a more modest solution to a specific problem. The problem addressed by H.R. 1063, according to the committee report, was the inadequacy of law enforcement and of the adjudication of civil conflicts in some Indian lands:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; con-

[7] The House Report was adopted by the Senate Committee as its report as well.

sequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.

After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws. [H. Rep., p. 6; S. Rep., p. 5.]

That the bill was considered by those who dealt with it to be a law and order measure and not a general termination of federal responsibility is apparent. The law amends Titles 18 and 28 of the Code, and not Title 25 in which the general provisions for federal protection of Indians and statutes ter-

minating such protection are found. The law contains broad provisos, apparently intended to make clear that the grant of state jurisdiction would not affect the trust status of Indian property or authorize the taxation of such property or the regulation of it contrary to federal treaty, agreement or statute. P.L. 280, §§ 2(b) and 4(b), 18 U.S.C. 1162(b), 28 U.S.C. 1360(b). Moreover, there is no indication in the committee reports or debates that a conferral of civil and criminal jurisdiction under Public Law 280 would extend the power of the State to tax Indians, although if this were intended it would have been a matter of sufficient importance to be set before Congress. Similarly, there is no special reference in the legislative history of the Act or the Act itself to a partial repeal of the longstanding federal regulation of trading with Indians.[8]

Moreover, when a State assumes jurisdiction under Public Law 280, most Indian disabilities, including those relating to the trust status of the land and requiring federal consent for leases, mortgages and the like, remain. P.L. 280, §§ 2(b) and 4(b), 18 U.S.C. 1162(b), 28 U.S.C. 1360(b). The tribal structure and government remain; the reservation is not abolished; and the Indians remain the beneficiaries of all federal programs for Indian development that would otherwise be available except those concerning crime prevention and law enforcement. Considerable

[8] Although not used in the State of Washington, these regulations are in use elsewhere and serve to protect the Indians against unscrupulous merchants.

sums are still expended by the federal government on such programs for tribes which have become subject to state civil and criminal jurisdiction.[6]

3. Nevertheless, from a literal reading of Public Law 280 it can be argued that since the "civil jurisdiction" conferred on the State encompasses not only access to state judicial machinery but also state substantive law (subject to listed exceptions), it also includes state regulation and taxation of commerce, so long as the State does not tax real or personal property in trust or regulate the use of such property in a manner inconsistent with any federal treaty, agreement, statute or regulation (P.L. 280 § 4(b), 28 U.S.C. 1360(b)). It can further be argued that the trust status of appellant's land does not in itself prevent taxation and regulation of his commercial activities conducted on it. But see *Squire* v. *Capoeman*, *supra*. It can also be argued that once a State has assumed judicial authority within Indian lands and has concomitantly assumed an increased fiscal responsibility, some of the basic reasons for the inapplicability of state taxation within those lands have been removed. However, the effect of state regulation and taxation on Indian self-government and the considerable Indian disability and federal responsibility

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[6] The Bureau of Indian Affairs, for example, reports expenditures of $14,072,394 for fiscal year 1971 in California, although Public Law 280 subjected all Indian lands within that State to state civil and criminal jurisdiction. The only major category of assistance omitted is "maintaining law and order".

which remain after a State assumes jurisdiction under Public Law 280 should also be taken into account.

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

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MAY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 465741 744

Supreme Court, U. S.
FILED
AUG 12 1972
E. ROBERT SEAVER, JR., CLERK

IN THE

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October Term, 1971
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LEONARD TONASKET,
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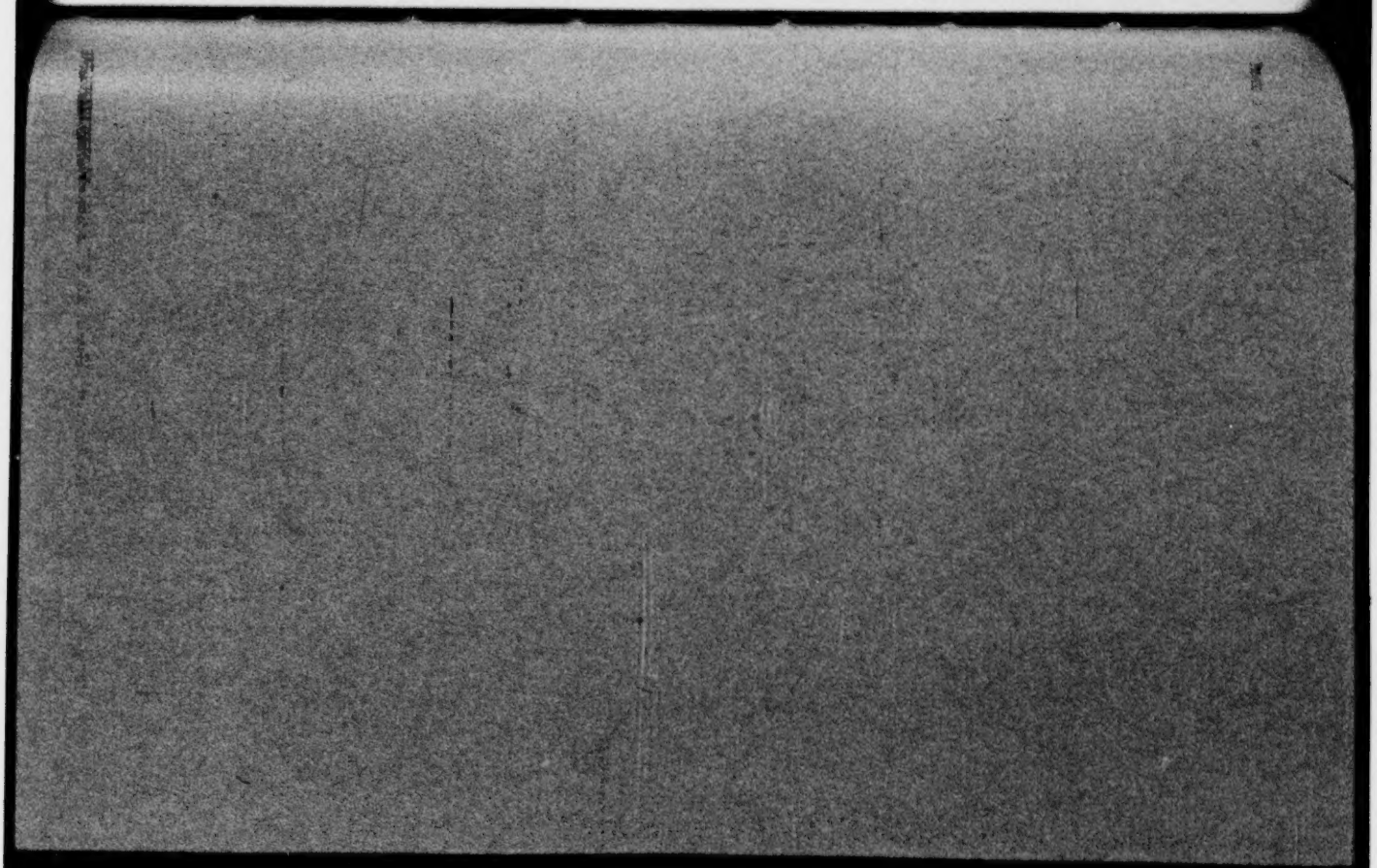

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Senate Report No. 699, U.S. Code Cong. & Ad. News, 1953, 83d Cong. 21-22, 23, 25

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

BRIEF OF APPELLANT

This case involves the question whether the State of Washington, having taken civil and criminal jurisdiction over the Colville Indian Reservation pursuant to Public Law 83-280,[1] may validly impose its excise taxes on a Colville Indian conducting a retail business on his trust land within the reservation.

In its decision, the Supreme Court of the State of Washington has interpreted Public Law 83-280 in such a sweeping manner as to extinguish all Indian immunities from State taxation, including those flowing from federal statutes, and those implicit in federal programs and policies, all long protected by decisions of the Supreme Court. The

1. App. A, p. A-8

Washington Court holds that Public Law 83-280 repeals the federal Indian trader statutes and makes State excise taxes, RCW Chapter 82, applicable to all Indian commerce on each of the eleven Indian reservations over which the State has assumed jurisdiction. The practical effect of the Washington Court's decision is to annihilate the sovereign powers of Indian tribes to impose their own tax and to regulate commerce on their reservations.

More important, the decision subjects Indian trust property to State taxation in a manner specifically prohibited by federal statutes.

Most significant of all, the Washington Court holds that Public Law 83-280 subjects Indians and Indian reservations to all State laws except those expressly excluded by its provisions.

Appellant, Leonard Tonasket, prays that, upon review and hearing, the judgment entered herein by the Supreme Court of the State of Washington on November 15, 1971, be reversed.

OPINIONS BELOW

The opinion of the Washington Court is reported at 79 Wn.2d 607, 488 P.2d 281 (1971), and is reprinted in the Single Appendix at page 41. The superior court's (trial court) Memorandum Opinion is not reported but is reprinted in the Single Appendix at page 19. The judgment appealed from (being the Remittitur) is reprinted in the Single Appendix at page 57.

JURISDICTION

On March 8, 1967, Leonard Tonasket, a full-blood Colville Indian, filed a complaint [2] in the Superior Court

2. Single App., p. 6.

for the State of Washington for Thurston County, seeking a declaratory judgment that RCW Chapter 82, as applied, is invalid and repugnant to Article I, Section 8, clause 2 of the United States Constitution (the Indian Commerce clause), 25 U.S.C. § 261 *et seq.* (the federal Indian trader statutes), 24 Stat. 388 (the General Allotment Act of February 8, 1887), the sovereignty of the Colville Confederated Tribes, decisions of the Supreme Court, federal laws and regulations, and federal Indian policy. The complaint prayed that the State be enjoined from taxing, harassing, or interfering with Leonard Tonasket's retail business conducted on his trust allotment in the Colville Indian Reservation, and the State be directed to return merchandise confiscated from his business.

On March 21, 1968, the matter was tried in the superior court and on Oct. 7, 1968, Honorable Hewitt A. Henry rendered a Memorandum Opinion holding that Leonard Tonasket's business is subject to State taxes and that an injunction would not lie.

On January 21, 1969, judgment [3] was entered adjudging that all the excise tax laws of the State apply to all commerce on the Colville Indian Reservation, whether by Indian traders or not, as a direct result of assumption of jurisdiction over the Tribes and their members by the State pursuant to Public Law 83-280.

On January 23, 1969, Leonard Tonasket filed a timely Notice of Appeal[4] to the Washington Court.

On September 2, 1971, the Washington Court affirmed

3. Single App., p. 26.

4. R. 29

and expanded the decision of the superior court by rendering a written opinion holding that all State laws apply to the Colville Indian Reservation and its members except those expressly excluded by Public Law 83-280.

On November 15, 1971, the Washington Court issued to the superior court its Remittitur, which is the judgment enforcing the written opinion of the Washington Court entered September 2, 1971.

On December 10, 1971, Leonard Tonasket filed in the Washington Court a timely Notice of Appeal[5] to the Supreme Court.

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U.S.C. § 1257(2), which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "• • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 686 (1965); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288, 289 (1921).

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5. R. 186

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

(Only the footnoted items appeal in Appendix A)

United States Constitution, Article I, Section 8, clause 2[6] (the Indian commerce clause).

25 U.S.C. § 261 *et seq.*, (19 Stat. 200, 1876)[7] (Indian Traders Act).

25 U.S.C. § 348 (General Allotment Act of 1887).

25 U.S.C. § 1302-3 (Indian Bill of Rights)

25 U.S.C. § 1321-26[8] (authorizing States to assume or retrocede certain jurisdiction over Indian country).

25 C.F.R. § 251 (1965)[9] (regulations of the Bureau of Indian Affairs pertaining to Indian traders).

25 C.F.R. § 91.12, § 91.13[10] (regulations of the Bureau of Indian Affairs pertaining to loans of tribal funds).

Public Law 83-280 (67 Stat. 588, 18 U.S.C. § 1162; 28 U.S.C. § 1360)[11] (authorizing States to assume certain jurisdiction over Indian country).

Executive Order of July 2, 1872, 1 Kapp. 916[12] (establishing the Colville Indian Reservation).

Constitution and By-Laws of the Confederated Tribes of the Colville Indian Reservation, Washington.[13]

Colville Tobacco Ordinance As Amended, Resolution 1972-375.[14]

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6. App. A, p. A-1
7. App. A, p. A-1
8. App. A, p. A-2
9. App. A, p. A-6
10. App. A, p. A-7
11. App. A, p. A-8
12. App. A, p. A-12
13. App. A. p. A-13
14. App. A, p. A-23

Title 82 of the Revised Code of Washington covers all of the excise taxes imposed by Washington State law, and the following chapters are involved herein:

Chapter 82.04—business and occupation tax on manufacturers, retailers and other forms of business.

Chapter 82.08—retail sales tax on all retail sales.

Chapter 82.12—use tax on use of personal property in the State.

Chapter 82.16—public utility tax, imposing a tax on all persons engaging in certain businesses.

Chapter 82.24—tax on cigarettes.

82.24.020—(See below, ch. 157, Laws of 1972, 1st Ex. Sess., 519)

82.24.050—Duty of retailer.[15]

82.24.080—(See below, ch. 157, Laws of 1972, 1st Ex. Sess., 519)

82.24.110—Other offenses—Penalty.[16]

82.24.130—(See below, ch. 157, Laws of 1972, 1st Ex. Sess., 519)

82.24—New sections. (See below, ch. 157, Laws of 1972, 1st Ex. Sess., 519)

Chapter 82.26—tax on tobacco products.

Chapter 82.28—tax on certain mechanical devices.

Chapter 82.32—general administrative provisions

82.32.030—Registration certificates.[17]

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15. App. A, p. A-28
16. App. A, p. A-29
17. App. A, p. A-30

82.32.210—Tax warrant—Levy upon property —Revocation of certificate of registration.[18]

82.32.240—Tax constitutes debt—Priority of Lien.[19]

82.32.290—Unlawful acts—Penalties.[20]

Chapter 82.36—motor vehicle fuel tax.

Chapter 82.40—use fuel tax.

Chapter 82.44—motor vehicle excise.

Chapter 82.48—aircraft excise.

Chapter 82.50—house trailer excise.

Chapter 157, Washington Laws, 1972, 1st. Ex. Sess., p. 519-525[21] (including veto message of Governor Evans of February 27, 1972).

QUESTIONS PRESENTED

The basic questions presented are the following:

1. Does Public Law 83-280 allow State excise taxes to be validly imposed upon Indian commerce conducted by a full-blood Indian upon his trust land in an Indian reservation which is subject to State civil and criminal jurisdiction, where failure to pay such taxes may result in levy and sale of his real or personal property?

2. Does Public Law 83-280 impliedly repeal the federal Indian trader statutes on Indian reservations which are subject to State civil and criminal jurisdiction?

3. Does Public Law 83-280 make all State laws except those expressly excluded by its provisions applicable to Indians and Indian reservations which are subject to State civil and criminal jurisdiction?

18. App. A, p. A-31
19. App. A, p. A-32
20. App. A, p. A-33
21. App. A, p. A-34

STATEMENT OF THE CASE

The Colville Confederated Tribes comprise eleven separate tribes of Indians who formerly occupied large areas of Eastern Washington until they were placed upon the Colville Indian Reservation established by Executive Order of the President of the United States in 1872.[22] The Tribes are recognized by the United States Government, Bureau of Indian Affairs, and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938.[23] Of the 5,432 enrolled members of the Tribes, approximately half live on the Colville Indian Reservation which encompasses 1.3 million acres and is governed by the 14-member Colville Business Council.

The land upon which Leonard Tonasket operates his retail store is allotted land held in trust for him by the United States.

Leonard Tonasket, a full-blood enrolled member of the Colville Confederated Tribes, is a direct descendant of Chief Tonasket of the Okanogan Band, one of the eleven tribes in the confederacy on the Colville Indian Reservation.

In 1963 Leonard Tonasket leased a store in East Omak on the Colville Indian Reservation and established a retail business, selling cigarettes and other merchandise. On April 9, 1964, Leonard Tonasket applied to the Tribal Loan Office for a loan of federally-restricted funds in the sum of $1,000 specifically for the purchase of a larger cigarette inventory.[24] Mr. Robert D. Holtz, Area Director of the Bureau of Indian Affairs for the Portland Area Office,

22. App. A, p. A-12
23. App. A., p. A-13
24. Single App., p. -3

approved[25] the cigarette inventory loan in the sum of $800, and a mortgage upon Mr. Tonasket's trust allotment S-2026 was given to secure the loan, all pursuant to the provisions of 25 C.F.R. § 91.12 *et seq.* Thereafter, Leonard Tonasket borrowed from the tribal loan office an additional $6,000 of federally-restricted funds with which to construct a new store building on his trust allotment to expand his retail business,[26] and again, a mortgage upon his trust allotment S-2026 was given to secure the loan.

Because the federal Indian trader statutes do not require a license of a trader on an Indian reservation who is a full-blood Indian (25 U.S.C. § 264), Leonard Tonasket did not obtain a federal trader's license. And because he is a full-blood enrolled member of the Colville Confederated Tribes operating a retail store on his trust land with the full sanction of the Federal Government and with federally-restricted funds, Leonard Tonasket did not register with the State of Washington or affix tax stamps to cigarettes in his possession and being sold in his business.

In February of 1967, agents of the Washington Tax Commission entered the Colville Indian Reservation, seized a great number of cigarettes from Leonard Tonasket's trust land, and placed him under arrest for failing to register with the Tax Commission in violation of RCW 82.32.030 and RCW 82.32.290, possessing unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110, and selling unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110.

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25. Single App., p -5
26. R. 81

Approximately 800 cartons of cigarettes were seized from Leonard Tonasket's trust land. As a result of the action of the Washington Tax Commission, Leonard Tonasket commenced the present action which culminated in the decision of the Washington Court on November 15, 1971.

On February 19, 1972, the Washington State Legislature enacted a new cigarette tax law, Chapter 157, Washington Laws, 1972, 1st. Ex. Sess. Section 7 of the Act resulted from the loud clamor of non-Indian citizens who desired to continue purchasing cigarettes at military commissaries taxfree and in the States of Oregon and Idaho, whose cigarette taxes are, respectfully, 13¢ and 10¢ per package less than Washington's.[27]

Section 7 provides:

> "[A] person may acquire and physically possess, if acquired and possessed for purposes other than resale, four hundred or less cigarettes at any single time without incurring tax liability under this chapter, RCW 28A.47.440 and RCW 73.32.130."

This section, in the words of Governor Evans' veto message to the Washington State Legislature,

> "[L]egitimatizes individual possession of two cartons or less of unstamped cigarettes if held for personal use, thus legitimatizing to that extent non-Indian purchases from Indian sellers who have not collected the tax otherwise due from such buyers."

On March 10, 1972, the Colville Business Council enacted the Colville Tobacco Ordinance, Resolution 1972-125. The ordinance was amended as Resolution 1972-375 on June 23, 1972.

The Colville Tobacco Ordinance makes the sale and distribution of cigarettes and other tobacco products on

27. Oregon Revised Statutes § 323.030; Idaho Code § 63-2503.

the Colville Indian Reservation a tribal enterprise, establishing tribal tobacco outlets on trust land in the Reservation. Each outlet is managed by an enrolled member of the Tribes pursuant to a tribal license *and* a federal Indian trader's license.

The ordinance imposes a tribal tax of 3¢ per package of cigarettes sold or distributed on the Reservation.

All tobacco purchases by the Tribes under the ordinances are made with federally-restricted tribal funds, and all tobacco products situate in tribal tobacco outlets remain federally-restricted tribal property until sale to the ultimate consumer.

Finally, the ordinance restricts sales to non-Indians to two cartons per sale, in keeping with the spirit of the new State cigarette law, and prohibits sales of tobacco products to persons under the age of 18 years, as required by 25 C.F.R. § 251.17.

Pursuant to the Colville Tobacco Ordinance, the Commissioner issued a federal Indian trader's license to appellant on February 28, 1972,[28] and the Colville Confederated Tribes issued appellant a tribal license as operator of Tobacco Outlet No. 1 on May 25, 1972.[29] Thereupon, appellant began operating his tobacco business for the Tribes under the Colville Tobacco Ordinance.

The tobacco ordinance adopted by the Colville Confederated Tribes has been adopted by the Makah, Lummi and Suquamish Tribes in the State of Washington and is being considered by many more. Most of the tribes considering the ordinance have no tribal income[30] and seek to

28. Appendix B, p. B-1
29. Appendix B, p. B-2
30. Appendix C, p. C-1

exercise their sovereign right to tax for the first time as a means of becoming self sufficient and achieving the economic independence stressed as our national goal for American Indians by President Nixon in his speech to Congress of July 8, 1970.[31]

SUMMARY OF ARGUMENT

1. The Colville Confederated Tribes Have All the Powers of a Sovereign Government Except Those Specifically Taken by Congress

The sovereign powers of an Indian tribe to regulate commerce on its reservation and to levy taxes on such commerce may not be impaired by the State unless Congress has given its express consent.

2. Public Law 83-280 Was Enacted by Congress for the Limited Purpose of Giving States Jurisdiction Over Criminal and Civil Litigation Arising on Indian Reservations

The clear legislative purpose of Congress in enacting Public Law 83-280 was to give States jurisdiction over criminal and civil litigation arising on Indian reservations. The language of section 4(a) of the Act making "civil laws . . . of general application" effective on Indian reservations must be read as referring only to State civil laws having to do with "civil causes of action" and not to State excise tax laws.

3. Washington Excise Taxes Do Not Apply on the Colville Indian Reservation Since Congress Has Not Specifically Granted Taxing Power to the State

By clearly established legislative policy, Congress applies State taxes within federal areas or with respect to Indians only by express legislation. Congress has not done so in Public Law 83-280.

31. H.R. Doc. No. 91-363, 91st Congress, 2d Sess. (1970).

4. The Washington Court's Decision Would Terminate Indian Tribes Contrary to Public Law 83-280 Which Provides for Continued Tribal Existence

Application of all State civil laws to the Colville Indian Reservation except those specifically exempted in section 4(b) of Public Law 83-280 is inconsistent with the Constitution and By-Laws of the Tribes and the Civil Rights Act of 1968, and would essentially terminate the Colville Confederated Tribes as a political entity.

5. Congress Has Exclusive Jurisdiction of Trading on the Colville Indian Reservation

The Federal Government has preempted the field of trading on Indian reservations by statute and regulation. The Supreme Court has made it clear that States may not interfere with that preemption as Washington is now attempting to do.

6. Imposition of State Excise Taxes on Indian Personal Property Is Prohibited by Public Law 83-280

Section 4(b) of Public Law 83-280 and the *Squire v. Capoeman* and *United States v. Rickert* decisions prohibit State taxation of Indian trust land or personal property used in the economic development of trust land.

7. Federal Policy Regarding Indian Trust Land Prohibits State Taxation of Indians and Their Property and Commercial Activity on Indian Reservations

The State excise taxes here sought to be imposed are in direct conflict with the federal policy of maximizing profitability of Indian trust land.

8. Application of State Excise Tax Violates Tribal Sovereignty of the Colville Confederated Tribes

State excise taxes infringe upon the sovereign powers of the Colville Confederated Tribes to tax and regulate

commerce on the Reservation, directly contrary to the tribal Constitution and By-Laws and the *Williams v. Lee* decision.

9. Congressional Acts and Other Indian Protections Are Not Repealed or Destroyed by Implication

Federal preemption of trading on Indian reservations, Indian tax immunities, federal Indian policies and sovereign tribal powers are not to be deemed repealed by implication.

ARGUMENT

The opinion of the Washington Court upholding application of State excise taxes to retail sales on the Colville Indian Reservation rests upon a simple but very seductive syllogism:

> Under Public Law 83-280, the civil jurisdiction of Washington over the Colville Indian Reservation gives "those civil laws of such State that are of general application to private persons or private property . . . the same force and effect . . ." within the reservation as elsewhere within the State.
>
> The excise taxes of RCW Title 82 apply generally within the State.
>
> Therefore, the excise taxes of RCW Title 82 apply on the Colville Indian Reservation.

The Washington Court found support for its conclusion in two doctrines: one legal, the other equitable.

First, the Court noted section 4(b) of Public Law 83-280 which excludes trust property from State jurisdiction. Applying the "venerable phrase," *expressio unius est exclusio alterius*, the Washington Court concluded that Congress intended no other restriction upon State jurisdiction, and held:[32]

32. Single App., p. 46

"The trial court was of the opinion that the authorization contained in Public Law No. 83-280 was *plenary*, with only the limitations expressed therein, and gave the states power to regulate the merchandising activities of Indians in the same way that they regulate such activities of their citizens generally, and to levy excise taxes upon them. *We agree.*" (Emphasis supplied.)

Second, the Washington Court, after a cursory examination of the legislative history of Public Law 83-280, decided that Congress intended to add the financial burdens of State law to Indian tribes who obtained the so-called benefits of State jurisdiction. The Washington Court held:[33]

"We cannot conceive that it was the intent of Congress to extend to Indians only the protection and benefits of state laws, *with none of their attendant duties and responsibilities*, and we find no such intention expressed in the statute." (Emphasis supplied.)

and further held:[34]

"It was the evident purpose of Congress to facilitate the emergence of the Indian from his inferior status . . . to the status of full citizen, . . . *with all of the privileges and responsibilities of such status.*" (Emphasis supplied.)

Once it had reached this broad conclusion, the Washington Court bowled over every legal obstacle in its path, including federal policies regarding Indian trust property and tribal sovereignty, Supreme Court decisions, and, finally, the federal Indian trader statutes. The Court reached the astonishing conclusion that:[35]

"Here, the Congress has not only failed to preempt the field of Indian trading but it has authorized the state to assume jurisdiction over such trading; . . ."

33. Single App., p. 49
34. Single App., p. 53
35. Single App., p. 53

The end result of the Washington Court's opinion is to apply all Washington excise taxes to all commercial activity on the Colville Indian Reservation, including retail sales of milk and bread to poor Indian families.

The reasoning of the Washington Court has led it to an erroneous result for three principal reasons.

First, the Washington Court fails to come to grips with the concept of sovereignty of an Indian tribe as a governmental entity under federal law. Second, the Washington Court misconstrues the federal "trust doctrine" regarding Indian property and its use. Finally, the Washington Court misreads Public Law 83-280 and its legislative history as a termination act, rather than a law specifically tailored to meet a "law and order" need on Indian reservations.

Each of these areas is abstruse and complex and all involve the unique three-cornered relationship between federal, state and tribal governmental entities. But upon a careful analysis of each area in this significant case, the reasoning of the Washington Court is demonstrably false.

1. The Colville Confederated Tribes Have All the Powers of a Sovereign Government Except Those Specifically Taken by Congress

Prerequisite to a proper determination of this case is a preliminary consideration of the basic nature of the Colville Confederated Tribes as a political entity.

The original sovereign status of Indian tribes is explicated at length in FEDERAL INDIAN LAW, 1958 (1966 printing by Association on American Indian Affairs, Inc., N.Y.) at page 395:

> "Indian self-government includes generally the power of an Indian tribe, to the extent that it has

not been limited by Federal law, to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice. Originally, those powers which were exercised by an Indian tribe were not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited dependent sovereignty which had not been extinguished by Federal action. Each Indian tribe began its relationship with the Federal Government as a sovereign or quasi-sovereign government, recognized as such by treaty and in legislation. These powers of sovereignty have been limited from time to time by special treaty provisions and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, should be exercised elsewhere. *The statutes of Congress, then, must be examined carefully in many instances to determine its source or its positive content.*" (Emphasis supplied.)

It is stated further at page 398:

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, *but did not by itself terminate the internal sovereignty of the tribe*, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government." (Emphasis supplied.)

Two essential attributes of tribal sovereignty are the

powers to tax and to regulate commerce on Indian reservations.

In *McCulloch v. Maryland*, 4 Wheat. 316, 428 (1819), this Court held that the power to tax is an attribute of sovereignty "essential to the very existence of governments." As stated in FEDERAL INDIAN LAW at page 435:

> "One of the powers essential to the maintenance of any government is the power to levy taxes. That power is an attribute of tribal quasi-sovereignty which continues unless withdrawn by act of Congress or limited by treaty."

Morris v. Hitchcock, 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir., 1956); *Buster v. Wright*, 135 Fed. 947 (8th Cir., 1905), *appeal dismissed*, 203 U.S. 599 (1906).

The power of an Indian tribe to regulate commerce on its reservation derives in part from its power to tax and in part from its power to regulate the use and disposition of property on the reservation. As stated in FEDERAL INDIAN LAW at page 440:

> "In the first place, the tribe has, with respect to tribal property, certain rights and powers commonly incident to property ownership. In the second place, the Indian tribe has, among its powers of sovereignty, the power to regulate the use and disposition of individual property among its members."

and again at page 443-444:

> "In its quasi-sovereign capacity and in the exercise of local self-government, it may exercise powers similar to those exercised by any State or municipal corporation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress."

As tribes governed by a federally-approved Constitution and By-Laws, the Colville Confederated Tribes, in their quasi-sovereign capacity, enumerate among their attributes of sovereignty the power to tax and the power to regulate commerce, *except to whatever extent those powers have been diminished by express legislation of Congress.* A major aspect of this case is the question whether the sovereign tribal powers to tax and to regulate commerce on the Reservation are altered by Public Law 83-280.

2. Public Law 83-280 Was Enacted by Congress for the Limited Purpose of Giving States Jurisdiction Over Criminal and Civil Litigation Arising on Indian Reservations

A thorough examination of Public Law 83-280 and its legislative history reveals a congressional intent to provide a State forum for criminal and civil litigation arising on Indian reservations, but no congressional intent to affect Indian tax immunities. The langage of section 4(a) of Public Law 83-280 granting Washington *civil* Indian jurisdiction reads as follows:

> "Each of the States . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State: . . ."

Nowhere in the language of section 4(a) is the word "tax" employed. But the Washington Court reasoned that the broad language referring to "civil causes of action" and "civil laws . . . of general application," when coupled with Congress' failure to expressly exclude State taxing power in

section 4(b) of the Act, constitutes an implied grant of taxing power to the State.

This conclusion of the Washington Court is directly contrary to the well-established doctrine of law of the Supreme Court that all agreements, treaties, statutes and laws are to be liberally construed to protect the rights of Indians with all ambiguities resolved in the Indians' favor. In *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court held at page 576:

> "By rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."

Again, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Supreme Court stated at page 89:

> "[S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."

The Washington Court has applied this principle in reverse, resolving doubtful expressions in favor of the State and liberally construing the "civil laws . . . of general application" language against the Indians. This language of section 4(a) is broad enough, however, to lend some support to the Washington Court's position. But a comprehensive examination of Public Law 83-280 set within the context of federal Indian law and the specific legislative purpose of Congress in its enactment clearly refutes the conclusion reached by the Washington Court.

A. *Law and Order Purpose of Public Law 83-280.*

Public Law 83-280 was not enacted in a vacuum. Rather it was one of a large number of pieces of legislation considered by the 83rd Congress in 1953 at a time when Con-

gress was strongly supporting federal termination of Indian tribes. An examination of Senate Report No. 699[36] which accompanied the bill reveals that although the Committee on Interior and Insular Affairs operated in five major areas of legislation affecting Indians in the 83rd Congress, yet Public Law 83-280 itself was tailored specifically to meet only two narrow legislative purposes, namely, to extend State criminal laws to Indian country and to make provision for State courts "to adjudicate *civil controversies* of any nature affecting Indians within the State, except where trust or restricted property was involved."[37] (Emphasis supplied.)

This purpose is clearly delineated in the report as follows:

> "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created *a hiatus in law-enforcement authority* that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.
>
> "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts *to adjudicate civil controversies* arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.
>
> "After consideration of the proposed legislation, the

36. U.S. Code Cong. & Ad. News, 1953, 83d Cong., at 2409
37. *Ibid*, at 2411

committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances *to civil transactions* among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws." (Emphasis supplied.)

Public Law 83-280 stemmed, then, from a lack of adequate law enforcement on Indian reservations, both in the criminal and civil areas. The legislative history of the Act, including the House and Senate reports, the remarks made in Congress, and accompanying documents printed in the Congressional Record, are replete with indications that the sole concern of Congress in enacting Public Law 83-280 was to provide a State forum for adjudication of criminal and civil litigation arising on Indian reservations.[38]

The statements by Senator Thye, and the letter from Governor Youngdahl of Minnesota, make specific reference to "criminal offenses" and "civil causes of action" committed or arising on Indian reservations, specifically in the areas of child welfare and youth conservation. Governor Youngdahl states at page 10783:

> "Experience with tribal courts and tribal justice has not been satisfactory and probably never could be an adequate substitute for regular civil law."

Again, Senate Report 699 demonstrates the "law and order" legislative purpose of Public Law 83-280. The report (see n. 36) states at 2412:

38. 83d Cong. 1st Sess., 99 Cong. Rec. 10782-10783 (1953)

> "The following tribes, *each of which has a tribal law and order organization functioning in a reasonably satisfactory manner*, have advised Bureau officials of their objections to State jurisdiction, and their reservation areas have therefore been excepted in the transfer legislation: Red Lake Band of Chippewa Indians of Minnesota, Warm Springs Tribe of Oregon, and the Menominee Tribe of Wisconsin." (Emphasis supplied.)

Following the committee reports, Congress exempted the three named tribes from State jurisdiction in section 2(a) of Public Law 83-280.

In light of this legislative history and resolving doubtful expressions in favor of the Indians, it now becomes clear that the sweeping language of section 4(a) making "those civil laws of such State that are of general application to private persons or private property" applicable on Indian reservations has reference only to that body of State civil law having to do with causes of action, such as tort law, contracts law, etc.

Adopting the committee recommendation that the Act "should retain application of Indian tribal customs and ordinances *to civil transactions* among Indians," Congress provided in section 4(c) of the Act that tribal ordinances and customs not inconsistent with State civil law be given full force and effect "in the determination of civil causes of action pursuant to this section."

The Supreme Court itself recently recognized that jurisdiction granted in Public Law 83-280 is a matter of litigation. In *Kennerly v. District Court of 9th Judicial District of Montana*, 400 U.S. 423 (1971), the Supreme Court referred in n. 1 on page 424 to Public Law 83-280 as an act which,

> "[E]xtended jurisdiction over *civil causes of action arising in Indian country* to which Indians are parties to five States. The statute is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of *state jurisdiction, whether civil or criminal, to actions to which Indians* are parties arising in Indian country." (Emphasis supplied.)

Again, the Supreme Court stated at page 428, when referring to the Civil Rights Act of 1968 (25 U.S.C. § 1321-1326) which provided for retrocession of Indian jurisdiction to the Federal Government, that the Act:

> "[R]epealed § 7 of the 1953 Act and substituted a new regulatory scheme for the extension of State civil and criminal jurisdiction to *litigation* involving Indians arising in Indian country." (Emphasis supplied.)

This analysis of the intended effect of Public Law 83-280 is corroborated by a careful examination of the Civil Rights Act of 1968.

25 U.S.C. § 1322, gives States the option of assuming total or *only partial* jurisdiction of civil causes of action arising on Indian reservations. The section again contains the sweeping phrase "civil laws . . . of general application" used in the 1953 Act, with no "total" or "partial" qualification. But the phrase "civil laws . . . of general application" could only make sense in a *partial assumption* situation if it is read as restricted to those State civil laws directly affecting the particular civil causes of action over which jurisdiction is assumed. To read it as the Washington Court does would allow the ludicrous result of granting a State *total* taxing power on an Indian reservation in which the State had assumed partial jurisdiction only; for example, jurisdiction over domestic relations.

Again, this conclusion is corroborated by 25 U.S.C. § 1326, which provides:

> "State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or *civil causes of action*, or with respect to both, shall be applicable in Indian country only where the enrolled Indians . . . accept such jurisdiction by a majority vote. . . ." (Emphasis supplied.)

B. *Lack of Taxing Purpose of Public Law 83-280.*

Returning now to Public Law 83-280, one discovers nowhere in the entire legislative history of the Act any reference to taxation. On the contrary, Congress was well aware of the possible financial burdens to States to whom Indian jurisdiction was transferred. House Report No. 848 points out that authorities in some counties in Nevada "stated they would accept such jurisdiction only with an accompanying Federal subsidy."[39]

The letter of Orme Lewis, Assistant Secretary of the Interior, included in House Report No. 848 recommends that jurisdiction over the Warm Springs Tribe not be granted to Oregon since the two counties in which the reservation is located "are poorly financed and heretofore have been unable to render any appreciable assistance to the Indians on the reservation."[40]

Mr. Lewis' letter also indicates that the States of Montana and South Dakota "would be agreeable to a transfer of jurisdiction if such transfer were accomplished by a complete Federal subsidy."[41]

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39. Senate Report 699, U.S. Code Cong. & Ad. News, 1953, 83d Cong. at 2412

40. *Ibid*, at 2413

41. *Ibid*, at 2414. In 1957 the South Dakota Legislature provided for State assumption of Indian jurisdiction on a county by county basis.

Keeping in mind that Congress was anxious for States to assume the jurisdiction it granted in Public Law 83-280, one is struck by the utter absence in the entire legislative history of the Act of any reference to a congressional intent that Public Law 83-280 grant States taxing authority within Indian reservations. Surely this is the point in the dialogue between Congress and the States at which Congress would have dispelled the financial fears of the States and counties contemplating acceptance of Indian jurisdiction with a clear statement that Public Law 83-280 did include such taxing authority, or with an amendment to the language of Public Law 83-280 stating that "civil laws . . . of general application, including tax laws, . . ." would apply on Indian reservations. Congress' failure to do so indicates that Congress was aware that Public Law 83-280 made no provision for State taxing authority but was not in a mood to make such provision or to subsidize transfer of jurisdiction.

South Dakota Compiled Laws 1-1-12 through 1-1-21 (1967). Section 1-1-14 of the statutes conditions the assumption of Indian jurisdiction as follows:

> "Prior to the adoption of such resolution, the county commissioners shall negotiate and contract with the federal bureau of Indian affairs of the United States department of interior for reimbursement of any authorized and appropriated federal funds for the added costs to any county in connection with the assumption of said jurisdiction."

Since the Bureau of Indian Affairs had no authority to participate in such a reimbursement contract, the counties of South Dakota did not assume Indian jurisdiction pursuant to the statutes. Secretary of the Interior, Annual Report (1957) at 253-4. In 1961 the South Dakota Legislature amended its law by providing in section 1-1-21 for State assumption of Indian jurisdiction on State highways, but provided that no further jurisdiction be assumed,

> "[U]nless and until the Governor of the state of South Dakota, if satisfied that the *United States of America has made proper provision for the reimbursement* to this state and its counties *for the added costs in connection with the assumption of said jurisdiction*, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted." (Emphasis supplied.)

3. Washington Excise Taxes Do Not Apply on the Colville Indian Reservation Since Congress Has Not Specifically Granted Taxing Power to the State

Congress has a clearly established legislative policy of enacting express legislation whenver it wants State taxes to apply within Indian reservations.

In 25 U.S.C. § 564j (The Klamath Termination Act), Congress provides that after termination of the tribe and distribution of property,

> "[S]uch property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians. . . ."

Identical language extending taxing powers to States is found in the following federal termination statutes: 25 U.S.C. § 677p (Ute); 25 U.S.C. § 699 (Western Oregon Tribes); 25 U.S.C. § 749 (Paiute); 25 U.S.C. § 798 (Wyandotte); 25 U.S.C. § 898 (Menominee); 25 U.S.C. § 978 (Ponca).

All the cited acts were enacted by Congress *after* enactment of Public Law 83-280. That Congress used such express and specific language to extend State taxing powers to the Indians involved indicates that prior to the termination acts, state taxing powers did not apply, although in some cases Public Law 83-280 did.

With respect to the Menominee Tribe of Wisconsin, the Supreme Court has held that even though the Menominee Termination Act lacked specific congressional language reserving hunting and fishing rights, nevertheless, the Termination Act could not be considered "as a backhanded way of abrogating the hunting and fishing rights of these Indians."[42]

42. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

Likewise, Public Law 83-280 should not be considered as a backhanded way of abrogating the long standing immunity of Indians from State taxes on their reservations. While Congress has the power to abrogate these immunities, the intention to do so is not to be lightly imputed to Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *Pigeon River Co. v. Cox Co.*, 291 U.S. 138 (1934), *Squire v. Capoeman*, 351 U.S. 1 (1956).

In addition to congressional policy, the Supreme Court upheld tax immunity of Indians in *Squire v. Capoeman*, *supra*. *Squire* dealt with an attempt by the Federal Government to tax income from the sale of timber of allotted trust land granted to Indian taxpayers under the provisions of the General Allotment Act of 1887 (24 Stat. 388). The Supreme Court held that section 5 of the Act, requiring conveyance of lands to the Indian allottees in fee "free from all charge or encumbrances," and section 6 of the Act, providing that when an Indian allottee receives a patent in fee simple, his former trust land "shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent," necessarily exempted from federal income tax all income derived from timber sales. The rationale of the Supreme Court was twofold: First, if such income were subject to federal income tax, then nonpayment of the tax would result in a tax lien upon the trust land or a prior debt which would attach to the land upon its receipt by the Indian allottee in fee simple, either of which would violate the Act; and second, congressional policy of allowing Indians to go forward when declared competent with the necessary chance of economic survival in competition with others would be defeated if the

corpus of the trust could be depleted through payment of federal income tax.

The doctrine is well established that original sovereign tax immunities of Indians will be protected by the Supreme Court and will not be deemed abrogated by later federal statutes *in the absence of express language*. The *Squire* case stands squarely for this proposition, and it has been explicitly adopted by the United States Court of Claims in *Mason v. United States* ....F.2d.... (Docket No. 417-70, decided June 16, 1972).

The power to tax is a peculiar sovereign attribute of any governmental entity and does not fall within any reasonable interpretation of the phrase "civil causes of action" which is the subject matter of Public Law 83-280. As will be demonstrated, the existence of State taxing power on an Indian reservation necessarily results in annihilation of the sovereign tribal power to tax. In light of the trust relationship between the United States and Indians, it is unthinkable that Congress would extend all State excise tax to Indians and commercial activities on the Indian reservations without expressly saying so. To hold that Congress has done so implicitly in Public Law 83-280 would, indeed, be to impute unjustifiably to Congress a "sorry breach of faith with the Indian people."

4. The Washington Court's Decision Would Terminate Indian Tribes Contrary to Public Law 83-280 Which Provides for Continued Tribal Existence

The opinion of the Washington Supreme Court not only affirmed the judgment of the trial court that all State excise tax laws apply on the Colville Indian Reservation, but went further, and held that *all* civil laws of the State apply with only the exemptions "clearly and concisely set

forth" in section 4(b) of Public Law 83-280. As will be demonstrated, the effect of the Washington Court's decision makes Public Law 83-280 a termination act which destroys the continued existence of Indian tribal entities.[43]

Not only was Public Law 83-280 not intended by Congress to be a termination act, the Act contains a clear indication that tribal governments were to continue. Section 4(c) of the act provides:

> "Any *tribal ordinance or custom heretofore or hereafter adopted* by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." (Emphasis supplied.)

The quoted language is consistent only with a congressional assumption that Indian tribes would continue to exist and that their governing bodies would continue to enact ordinances governing civil causes of action arising within their reservations.

Whenever Congress desires to terminate an Indian tribe, it does so in no uncertain terms. In the Menominee Termination Act, Congress provides that upon termination of the Menominee Tribe:[44]

> "[A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer

43. "The Indian knows that termination takes many forms. He can be flooded out of his reservation; he can be relocated; his reservation can be sold out from under him if he cannot meet taxes to which it is subject. His limited power to protect himself on the reservation from local prejudice and discrimination can be wiped away by the substitution of state laws for tribal law, and state jurisdiction for tribal jurisdiction. All of these, the Indian knows, are variants of one basic truth: the United States Government does not keep its promises. Sometimes it breaks them all at once, and sometimes slowly, one at a time. The result is the same—termination." E. Cahn, *Our Brother's Keeper* 21 (1969).

44. 25 U.S.C. § 899.

> be applicable to the members of the tribe, and the laws of the several States shall apply to the *tribe and its members* in the same manner as they apply to other citizens or persons within their jurisdiction." (Emphasis supplied.)

Thus, all special Indian protections are removed and both "the tribe *and* its members" are made subject to total State jurisdiction. This specific language is a far cry from the much narrower "civil causes of action" and "civil laws . . . of general application to private persons or private property" language of section 4(a) of Public Law 83-280. It must be stressed that Public Law 83-280 does not make the "tribe" itself subject to any State jurisdiction as do the termination acts.

Nor does Public Law 83-280 appear in Title 25, "Indians," of the United States Code which contains the federal statutes protecting the status of Indians or terminating that status. Instead, the civil jurisdiction portion of Public Law 83-280 is found in Title 28, "Judiciary and Judicial Procedure" of the Code, and the criminal jurisdiction portion is found in Title 18, "Crimes and Criminal Procedure," of the Code.

Not only is the legislative history of Public Law 83-280 devoid of any reference to taxation, it is also devoid of any reference to repeal of any of the myriad protections of Indian status or Indian tribes contained in treaties, Executive orders, Title 25 of the United States Code, federal regulations, Supreme Court decisions, and congressional policies. Yet an examination of Washington "civil laws . . . of general application to private persons or private property" will dramatically illustrate that the Washington Court's interpretation of Public Law 83-280 would repeal

those protections and so invade tribal sovereignty as to break down tribal government altogether. Examples follow:

A. *State Bill of Rights Guarantees Generally.*

Perhaps the most basic State "civil laws . . . of general application" are the Bill of Rights guarantees of the Washington State Constitution. If the Washington Court's opinion were applied literally, all those guarantees would apply both to the Tribes and to their members on the Colville Indian Reservation. That Congress did not intend Public Law 83-280 to have so far-reaching an effect is shown by enactment of the Civil Rights Act of 1968, *supra*. The Act pointedly limits tribal government to a lesser degree than federal and state governments are limited in their respective constitutions.

The important differences were recognized in *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir., 1971). The Court noted that the original draft of the Indian Bill of Rights provided limitations and restraints on tribal governments identical to those imposed on state and federal governments by the United States Constitution, but that in the Bill as finally enacted:

> ". . . Congress intended that the provisions of the Fifteenth Amendment, certain procedural provisions of the Fifth, Sixth, and Seventh Amendments, and in some respects the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights." *Groundhog, supra*, at 682.

Several general protections of the Washington State Constitution invite special attention.

B. *State Privileges and Immunities.*

Article I, section 12, of the State Constitution provides:

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

To apply this provision to the Colville Confederated Tribes would be to destroy the Tribes as a political entity, for it would strike down the prime sovereign right of the Tribes to determine questions of membership, a right guaranteed to the Tribes in Section 2, Article VII, of the Tribal Constitution and By-Laws, which reads:

> "The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:
>
> "(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.
>
> "• • •"

Tribal membership is, of course, the foundation upon which tribal rights rest, including the right to vote, the right to receive per capita distribution of tribal assets, and hunting and fishing and all other treaty protected rights. These significant privileges and immunities are the very essence of Indian status. They may not be interfered with by any State constitutional provisions, for, as held in *Martinez v. Southern Ute Tribe of the Southern Ute Reservation,* 249 F.2d 915 (10th Cir., 1957), at page 920:

> "The courts have consistently recognized that in absence of express legislation by Congress to the contrary, *a tribe has the complete authority to determine all questions of its own membership, as a political*

entity. Patterson v. Council of Seneca Nation, 245 N.Y. 433, 157 N.E. 734; *Waldron v. United States*, C.C., 143 F. 413; *Roff v. Burney*, 168 U.S. 218, 18 S. Ct. 60, 42 L.Ed. 442." (Emphasis supplied.)

C. *State Religious Freedom.*

Article I, section 11, of the State Constitution, as amended by Amendment 34, guarantees religious freedom and states that:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

This provision could not possibly apply to the Colville Confederated Tribes for two reasons:

First, in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir., 1959), the Court held that in the absence of a constitutional provision or law of Congress expressly making the Federal First Amendment applicable to Indian nations, no constitutional guarantee of religious freedom applied to Indian tribal governments. If *general* Federal Constitution protections do not bind Indian tribal entities, Public Law 83-280 certainly does not make *general* State Constitution provisions binding upon them.

Second, 25 U.S.C. § 1302 provides that no Indian tribe in exercising powers of self-government shall:

> "(1) make or enforce any law *prohibiting* the free exercise of religion . . ." (Emphasis supplied.)

Congress' careful excision of the "establishment of religion" clause of the Federal First Amendment shows that Congress knew perfectly well in 1968 that no State "establishment" provisions applied to Indian tribal organizations,

and did not wish to make them apply. Indian tribes remain free to establish tribal religion if they choose to do so.

D. *State Right to Vote.*

Article VI, section 1 (Amendment 5) of the Washington State Constitution provides in part:

> "All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided, That Indians not taxed shall never be allowed the elective franchise: . . . The legislative authority shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provision of this section."

But, Article III, Section 5 of the tribal Constitution and By-Laws provides:

> "Any enrolled member of the Confederated Tribes of the Colville Reservation who is twenty-one (21) years of age or over shall be entitled to vote."

and Section 2 provides:

> "The Business Council, or an election board appointed by the Council, shall determine rules and regulations governing all elections."

The Washington Court's opinion is tantamount to stripping the Colville Business Council of its sovereign power to govern elections and vesting that power in the State Legislature. Such cannot possibly have been Congress' intent in enacting Public Law 83-280.

E. *State Right of Habeas Corpus.*

Article I, section 13, of the State Constitution provides:

> "The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it."

The Washington Court's opinion would appear to afford any Indian detained in the tribal jail the right to test the legality of his detention by writ of habeas corpus in State superior court. But the legislative history of the Civil Rights Act of 1968 refutes this conclusion. Representative Reifel stated on the floor of the House on April 10, 1968:[45]

> "[H]e has only those rights which the Tribe is willing to recognize . . . it is not possible for a defendant to ever raise a question in an appeal or in a habeas corpus proceeding."

And in Senate Report 721, which accompanied the Act, Senator Ervin states in part:

> "One needs only to read a sampling of court decisions to realize that the Indian lives in a legal no man's land. In many instances, he is subject to three sovereigns—the Federal Government, State government, and tribal law—which present conflicting claims on the Indian's life."

F. *State Right to Counsel.*

Article I, section 22, of the State Constitution, as amended by Amendment 10, guarantees to persons accused of crimes the right to counsel in language similar to the guarantee of the Federal Sixth Amendment. In *Tacoma v. Heater*, 67 Wn.2d 733, 409 P.2d 867 (1966), the Washington Court held that the language of State constitutional provisions should receive the same definition and interpretation as that given to similar provisions in the Federal

45. 90th Congress, 2d Session, 114 Cong. Rec. 9552 (1968)

Constitution by the Supreme Court. Accordingly, under the State Constitution, an indigent accused has the right to appointed counsel paid for by the State.

In sharp contrast is 25 U.S.C. § 1302(6) which guarantees to an indigent accused the right

> "*[A]t his own expense* to have the assistance of counsel for his defense. . . ." (Emphasis supplied.)

It is clear that the State constitutional guarantee of counsel does not apply to an accused in an Indian tribal court or court of Indian offense.

G. *State Public Office.*

The State court system has jurisdiction to determine questions concerning the holding of public offices of State and municipal governments. Literal application of the Washington Court's opinion would give Colville Confederated Tribes the character of a municipal corporation and allow State courts to determine questions of tribal office holding.

However, in *State v. Bertrand*, 61 Wn.2d 333, 378 P.2d 427 (1963), the Washington Court itself held that the State court system had no authority to determine questions of office holding in the tribal government. The Court stated at page 340:

> "We find no authority, statute, or decisions giving the *courts* of this state jurisdiction to resolve the question of who composes the 'governing body' of the Quinaielt Indian Tribe. The Quinaielt Indian Tribe's control over its elected officials is peculiarly an internal problem and one over which the courts of this state have no jurisdiction."

The foregoing examples are by no means exhaustive,

but suffice to prove that the phrase "civil laws . . . of general application" of section 4(a) of Public Law 83-280 cannot be construed to give the States plenary jurisdiction as the Washington Court holds. Such plenary State jurisdiction would spell termination of Indian tribes as political entities and the trust responsibility of the Federal Government over the tribes would fail. So devastating a result cannot possibly be attributed to Congress in its enactment of Public Law 83-280 since it was *simultaneously* considering termination legislation carefully denominated as such.

Selection of a test by which to determine just which State civil laws Congress intended to apply to Indian reservations inevitably requires a return to the legislative history of Public Law 83-280 and an analysis of the kind appellant has made in section 2, *supra*. Appellant suggests that the only test consistent with Public Law 83-280, congressional policy, and Supreme Court doctrines is: whether the State civil law in question is directly related to specific civil causes of action over which the State has jurisdiction, and is not destructive to continued tribal existence.

5. Congress Has Exclusive Jurisdiction of Trading on the Colville Indian Reservation

Jurisdiction of the United States over Indian commerce is "exclusive and unfettered," *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), and includes "commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407 (1865). Pursuant to its constitutional authority, Congress has enacted comprehensive federal regulations over Indian commerce.

25 U.S.C. § 261 provides:

"The Commissioner of Indian Affairs shall have the

sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." (Emphasis supplied.)

Traders who are also full-blood Indians are subject to federal regulation as well, *United States v. Parton*, 132 F.2d 886 (1943), but are exempt from the licensing requirement of 25 U.S.C. § 264, which provides:

> "Any person *other than an Indian of the full blood who* shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: . . ." (Emphasis supplied.)

In *Warren Trading Post Co. v. Arizona State Tax Commission, supra*, the Supreme Court noted that federal preemption of Indian commerce is predicated upon a philosophy of protecting Indians. In *Warren*, Mr. Justice Black stated:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put *financial burdens on appellant or the Indians with whom it deals* in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 690-691. (Emphasis supplied.)

The Supreme Court also made it crystal clear that fed-

eral preemption of Indian commerce is total and exclusive. Mr. Justice Black stated:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.*" 280 U.S. at 690. (Emphasis supplied.)

The attempt by the Washington Court to distinguish away the holding of the Supreme Court in *Warren* on the ground that Arizona had not assumed Indian jurisdiction as Washington has is specious. The Supreme Court acknowledged the existence of Public Law 83-280 jurisdiction in n. 3 at page 687 of *Warren*, but nevertheless made no exception in its holding for states which have assumed jurisdiction pursuant to Public Law 83-280. The true basis for the *Warren* decision is the federal policy of total protection of Indian economy including both sales and purchases by Indians. Nothing in Public Law 83-280 purports to diminish that protection.

Appellant is a full-blood Indian and an enrolled member of the Colville Confederated Tribes doing business on trust land inside the Reservation. He not only received federal sanction to trade on the Reservation, . .t received two loans of federally-restricted trust funds, approved by the Area Director of the Bureau of Indian affairs, for purchase of cigarette inventory and for construction of his store building. Accordingly, appellant is a federal Indian trader and application of State excise tax to his retail business in this case is directly contrary to 25 U.S.C. § 261 *et seq.* and the *Warren* opinion.

In its opinion, the Washington Court noted that appellant held no federal Indian trader's license, that the Commissioner had never exercised his power to issue licenses in Washington[46] and concluded:[47]

> "Here, the Congress has not only failed to preempt the field of Indian trading . . . ."

Implicit in this language is the premise that where the Commissioner has failed to issue federal Indian traders' licenses, Congress' preemption over the field of Indian trading under 25 U.S.C. § 261 *et seq.* is somehow abandoned.

But *Warren, supra,* makes it clear that Congress has preempted the field of Indian trading, and the Supreme Court has established that even non-exercise of power by the Federal Government in a preempted field prohibits State interference without express Congressional authorization. *Guss v. Utah Labor Board,* 353 U.S. 1 (1957).

Furthermore, the Commissioner has now exercised his exclusive authority in the field of Indian trading in Washington by issuing to appellant a federal Indian trader's license on February 28, 1972, pursuant to the requirements of the Colville Tobacco Ordinance.

Thus, any future attempt by the State to levy taxes upon appellant's commercial activities would fly directly in the face of the *Warren* decision and the exclusive federal preemption of the field of Indian trading on the Colville Indian Reservation embodied in 25 U.S.C. § 261 *et seq.*

46. Single App., p. 52, n. 4
47. *Ibid,* p. 53

6. Imposition of State Excise Taxes on Indian Personal Property Is Prohibited by Public Law 83-280

Since it reads Public Law 83-280 as a congressional grant of power to the States to subject Indians to all State civil laws except those expressly excluded in the Act, the Washington Court holds that all *State excise tax laws* are applicable to appellant and his property.

The Washington Court examined the exclusion provisions of section 4(b) of the Act which read:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

and found no conflict between the State excise tax system and its enforcement provisions on the one hand, and the federal limitation on State jurisdiction on the other.

Of crucial importance, however, are the substantive provisions of State excise tax laws which provide remedies for default in payment of tax. RCW 82.32.210 provides in part:

> "If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the tax commission may issue a warrant under its official seal directed to the sheriff or any county of the state, commanding him *to levy upon and sell the real and/or personal property of the taxpayer*

found within his county, or such much thereof as may be necessary, for the payment of the amount of such warrant. . . ." (Emphasis supplied.)

RCW 82.32.240 provides in part:

"Any tax due and unpaid and all increases and penalties thereon, shall constitute a debt to the state and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies.

"In all cases of probate, insolvency, assignment for the benefit of creditors, or bankruptcy, involving any taxpayer, the claim of the state for said taxes and all increases and penalties thereon *shall be a lien upon all real and personal property of the taxpayer*, and the mere existence of such cases or conditions shall be sufficient to create such lien without any prior or subsequent action by the state . . . ." (Emphasis supplied.)

These provisions establishing liens upon all real and personal property of appellant in the event of his nonpayment of tax and providing for its levy and sale are directly contrary to the holding of the Supreme Court in *Squire v. Capoeman, supra,* and the *United States v. Rickert,* 188 U.S. 432 (1903).

In *Rickert,* the State of South Dakota sought to impose its personal property tax on a cow, horses and two wagons supplied by the United States Government to a tribal Indian. Holding that this direct tax would not lie, the Supreme Court held at page 442:

"These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract . . . . The government would not adequately discharge its duty to these people if it placed its engagements with them upon the

> basis merely of contract, and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. . . ."

Thus, the Supreme Court has prohibited taxation of income derived from trust land and has prohibited taxation of personal property used in the economic development of trust land. Both decisions rest squarely upon the trust status of Indian land and the federal protection carefully provided by Congress in sections 5 and 6 of the General Allotment Act.

Here, nonpayment of State excise tax by appellant would, under State law, result in a tax lien upon his personal or real property at the discretion of State taxing authorities, or a prior debt which would attach to his personal or real property upon its receipt in fee simple. This is precisely what Congress has declared may not be done by a State under the exclusion provisions of Public Law 83-280, and this is precisely what the Supreme Court has declared may not be done in *Squire* and *Rickert*.

The opinion of the Washington Court, therefore, imposing on Indians in Washington the entire structure of State excise taxes and laws governing their administration and imposition, has the inherent effect of encumbering Indian real and personal trust property, in violation of the express prohibition of section 4(b) of Public Law 83-280.

7. Federal Policy Regarding Indian Trust Land Prohibits State Taxation of Indians and Their Property and Commercial Activity on Indian Reservations

Land has always occupied a position of unique importance to the American Indian and remains the *sine qua*

non of Indian existence as a people. Accordingly, the single most important protection for the Indian is the trust status imposed upon Indian land by the Federal Government and the long-established federal policy protecting its use. The federal policy is to protect the Indian trust land and personal property and their use by providing financial advantages and thus to encourage Indians to become economically independent. *Squire v. Capoeman, supra.*

The financial advantages provided by federal policy are attainable only by maximization of the value of trust land through economic development, and extend to personal property used in connection with trust land as well as the land itself. *United States v. Rickert, supra.* In today's society, it is as much the governments' desire to foster successful business enterprises on Indian reservations as it is to encourage farming, ranching and fishing. *Makah v. Clallam County,* 73 Wn.2d 677, 686, 440 P.2d 442, 447 (1968).

So paramount is the federal policy and so closely tied to Indian trust land that it was specifically provided for in section 5 of the General Allotment Act, *supra,* and, as has been shown, specifically preserved intact in section 4(b) of Public Law 83-280:

> "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto. . . ."

Since a central goal of the federal policy underlying the trust status of Indian land is profitability of Indian enterprises, it follows that the measure of the federal policy's success is the degree of economic improvement in the Indian's position.[48] State tax upon commercial activity

48. Comment, "Indian Taxation: Underlying Policies and Present Problems," 59 Cal. L. Rev. 1261, 1276 (1971)

or personal property on the Colville Indian Reservation diminishes its profitability and directly interferes with the central policy goal.

In *Federal Land Bank v. Board of County Commissioners,* 368 U.S. 146 (1961), the Supreme Court voided a county personal property tax upon mineral rights owned by the Federal Land Bank. The decision turned upon the fact that the federal purpose of the Bank was to provide agricultural loans at low interest rates which was partially accomplished by distributing profits to its shareholder-borrowers, and any reduction of profits interfered with optimal achievement of the Bank's governmental functions.

The purpose underlying federal Indian policy is analogous since it depends directly upon maximum profitability of Indian trust land. Providing economic aid to Indians through prohibition of State taxation of property used on trust land or commercial activity on trust land, is a federally protected governmental activity.

The significance of the *Squire* and *Rickert* decisions is that Indian use of trust land inside reservations of tribes with an effective tribal autonomy will be protected from State taxation, and the protection will encompass personal property used in connection with the trust land. The prohibition of State "regulation of the use" of Indian trust property in section 4(b) of Public Law 83-280 reflects Congress' intention that these Indian tax immunities continue, unaffected by the Act.

Consistent with the federal policy regarding Indian trust property is the Colville Tobacco Ordinance which establishes tribal tobacco outlets on trust allotments of individual Indian operators and provides that all cigarettes

purchased by the Colville Confederated Tribes with federally-restricted tribal funds are "federally-restricted tribal property owned and possessed by the Tribes until sale to the ultimate consumer."

The commercial activity engaged in by appellant is the most logical method of maximizing profitability of appellant's trust land within the city limits of East Omak. And with complete federal sanction, appellant's commercial activity becomes a federally protected governmental activity. Since the effect of the Washington Court's opinion is a direct reduction of maximum profitability of appellant's trust land, the opinion violates the federal policy regarding Indian trust property as spelled out in the *Squire* and *Rickert* decisions, and protected in the General Allotment Act and Public Law 83-280.

8. Application of State Excise Tax Violates Tribal Sovereignty of the Colville Confederated Tribes

While Congress has increasingly subjected Indian tribes to State laws, particularly through Public Law 83-280, one important limitation on State authority over Indian reservations remains: unless jurisdiction is expressly granted by the Federal Government, it is denied to the State in all matters that would interfere with a tribe's right of self-government.

This principle has been repeatedly upheld by the Supreme Court. In *Warren,* the Supreme Court stated at page 687 n. 3:

> "Certain state laws have been permited to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or

> where they clearly do not interfere with federal policies concerning the reservations."

The inherent sovereign right of the Colville Confederated Tribes to regulate the use and disposition of property and commercial activity on the Colville Indian Reservation is preserved in Article V of the tribal Constitution:

> "(e) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon nonmembers doing business within the Reservation, or obtaining special rights or privileges, and the same may be applied to members of the Tribes provided such ordinances have been approved by a referendum of the Confederated Tribes."

The Tribes' sovereignty over commercial activity on the Reservation and their power to levy taxes result in a corollary immunity of such commercial activity from the myriad excise tax provisions of RCW, Chapter 82. In the face of this clear reservation of tribal sovereignty over commercial activity on the Reservation, Congress has not seen fit to grant specific taxing authority to the State of Washington.

Tribal sovereignty over commercial activity and taxation on the Reservation have been exercised through the Colville Tobacco Ordinance which makes sale and distribution of all tobacco products on the Reservation a tribal enterprise generating tax revenues for the tribal governmental entity.

According to the Washington Court, the State may impose a 17c per package State tax on cigarettes sold on the Reservation in addition to the 3c per package tribal tax. The total tax of 20c per package, higher than that

levied elsewhere within the State, would end all cigarette sales on the Reservation through tribal tobacco outlets.

Applying this principle generally, it is clear that imposition of *any* State excise tax on commercial activity on the Colville Indian Reservation results in the elimination of *any* tribal tax regulating the same commercial activity. And the ultimate effect of the opinion of the Washington Court is now obvious—it annihilates the sovereign power of the Colville Confederated Tribes to tax commercial activity on the Reservation.

In *Williams v. Lee,* 358 U.S. 217 (1959), the Supreme Court considered the question of civil jurisdiction of Arizona courts over two Navajo Indians in an action to collect for goods sold to them from a federal trader on the Navajo Reservation. The Supreme Court applied the following test:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220.

In this case, no specific act of Congress limits either the jurisdiction of the Colville Confederated Tribes over commercial activities or limits their taxing power on the Colville Indian Reservation. The opinion of the Washington Court not only infringes upon these two basic sovereign powers of the Colville Confederated Tribes but holds that they were impliedly taken away by Congress in Public Law 83-280.

The Washington Court points with alarm to the volume of appellant's sales and notes a large resulting tax loss to the State. Since the Washington State Legislature in 1972 legalized possession by each citizen of two cartons of un-

taxed cigarettes, whether purchased from military commissaries or from the neighboring States of Idaho and Oregon or from Indian sellers, this specter of State "tax loss" evaporates.

9. Congressional Acts and Other Indian Protections Are Not Repealed or Destroyed by Implication

The opinion of the Washington Court that Public Law 83-280 has repealed federal Indian trader statutes and destroyed Indian tax protections inherent in federal policies regarding Indian trust property as well as the sovereign tribal rights to regulate commerce and levy taxes, *all* by implication, is directly contrary to a well-established doctrine of law of the Supreme Court.

The doctrine holds that whenever possible, federal statutes are *not* to be deemed repealed by implication. In *Frost v. Wenie,* 157 U.S. 46 (1895), the Supreme Court held:

> "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—*no purpose to repeal being clearly expressed or indicated*—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute." (Emphasis supplied.) 157 U.S. at 58.

An analysis of Public Law 83-280 reveals no purpose, clearly expressed or indicated, to repeal or in any way abrogate the federal Indian trader statutes, the tax immunities of Indians and their property and commercial activ-

ity on Indian reservations, or sovereign powers embodied in the tribal constitution and by-laws. Nor is the language of Public Law 83-280 so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the subject of Indian trading or Indian taxation in any way whatsoever.

All of the statutes, tax immunities, federal policies, and sovereign tribal powers at stake can be given effect by the Supreme Court as well as Public Law 83-280. The only reasonable reading of the Act, in light of the doctrine that statutes be liberally construed to protect Indian rights with ambiguities resolved in the Indians' favor, is that none of these protections were affected by the Act and that the exclusion clauses indicate *only* what Public Law 83-280 does not do.

This conclusion is bolstered by 59 Cal. L.Rev. 1261, in which the author states at page 1267 that *Kirkwood v. Arenas,* 243 F.2d 863 (9th Cir., 1957), is "strong support" for the proposition that:

> "This clause clearly expresses Congress' intent that Public Law 280 should not expand state taxation of trust or restricted Indian real or personal property. Since the purpose of many Indian tax privileges is either to maximize the value of Indian property in fulfillment of the commitment to economic development or to recognize tribal sovereignty, *Public Law 280 should not be read to expand state power over other Indian-related tax exemptions; to do so would be inconsistent with federal policy.*" (Emphasis supplied.)

A congressional act, such as Public Law 83-280, imposing some general measure of State control over Indians, does not repeal or destroy by implication federal protections afforded to Indians. Specific language of repeal is

required in consonance with the long standing doctrines disfavoring repeal of federal statutes by implication and resolving all ambiguities in favor of Indians.

CONCLUSION

The Colville Confederated Tribes have the sovereign powers to regulate commerce on their Reservation and to levy taxes on such commerce except as expressly limited by Congress. Enactment by Congress of Public Law 83-280 enabled States to take jurisdiction of civil causes of action arising on Indian reservations but did not constitute a grant of taxing powers to States over Indians and their property and commercial activity on Indian reservations. Application of Washington excise taxes to appellant and his business on the Colville Indian Reservation is directly contrary to the federal Indian trading statutes and appellant's status as a federal Indian trader, the General Allotment Act of 1887, Public Law 83-280, the *Warren*, *Rickert* and *Squire* decisions of the Supreme Court, federal policies regarding Indian trust property and its use, and the sovereign powers of the Colville Confederated Tribes.

For these substantial reasons, the decision of the Washington Supreme Court must be reversed.

DATED this 1st day of August, 1972.

Respectfully submitted,

ZIONTZ, PIRTLE & MORISSET
ROBERT L. PIRTLE
Counsel for Appellant

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provision:

United States Constitution, Art. I §8, cl. 2

"The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

25 U.S.C. §§261-264:

§261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, §5, 19 Stat. 200.

§262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, §1, 31 Stat. 1066; Mar. 3, 1903, c. 994, §10, 32 Stat. 1009.

§263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be re-

jected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. §2132.

§264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person, shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commission of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. 2133; July 31, 1882, c. 360, 22 Stat. 179.

25 U.S.C. §§1321-1326:

§1321

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the

same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation therof.

Pub. L. 90-284, Title IV, §401, Apr. 11, 1968, 82 Stat. 78.

§1322

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging

to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 90-284, Title IV, §402, Apr. 11, 1968, 82 Stat. 79.

§1323

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. 90-284, Title IV, §403, Apr. 11, 1968, 82 Stat. 79.

§1324

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitu-

tion or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

Pub. L. 90-284, Title IV, §404, Apr. 11, 1968, 82 Stat. 79.

§1325

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

Pub. L. 90-284, Title IV; §405, Apr. 11, 1968, 82 Stat. 80

§1326

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country

accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Pub.L. 90-284, Title IV, § 406, Apr. 11, 1968, 82 Stat. 80.

Federal Regulations:

25 C.F.R. §251:

§251.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§251.3 Forfeiture of goods.

Any person other an an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affiairs. (R.S. 2133, as amended; 25 U.S.C. 264.)

25 C.F.R. §91.12, §91.13:

§91.12 Tribal funds.

(a) Tribal funds may be advanced to corporations and unincorporated tribes and bands, when authorized by Congress, upon request of the governing body and approval by the Commissioner, for the establishment of enterprises and for relending in accordance with paragraphs (b) and (c) of this section and § 91.13. No interest shall be paid to the United States on such funds.

(b) Support loans may be made to old, indigent, or disabled members, and loans may be made for burial expenses of members, when there is reasonable assurance that the loans will be repaid. Interest may be waived on such loans.

(c) Individuals need not be of at least one-quarter degree of Indian blood in order to receive loans of tribal funds, but must be members of the corporation, tribe, or band to which the funds belong.

(d) Failure of a corporation or unincorporated tribe or band to use tribal funds advanced under authority of paragraph (a) of this section in accordance with the regulations and the purposes for which requested, shall be grounds for any one or all of the following steps to be taken by the Commissioner:

(1) Discontinue further advance of funds requested.

(2) Require that the entire amount advanced be returned to the Treasury.

(3) Prevent further disbursement of tribal funds under the control of the corporation, tribe, or band.

(4) Withdraw any unobligated funds from the corporation, tribe, or band and deposit the same in the Treasury.

(5) Require that all repayments on loans made by the corporation, tribe, or band, be used to replace funds ad-

vanced to the corporation, tribe, or band from the Treasury.

(6) In the case of enterprises operated with tribal funds, to liquidate or operate or arrange for the operation of the enterprise, until all tribal funds advanced to the corporation, tribe, or band have been replaced in the Treasury, or until the Commissioner has received acceptable assurance that the funds will be replaced, or that the enterprise will be operated in a manner satisfactory to him.

§91.13 Relending by borrower.

(a) Funds loaned by the United States to a corporation, tribe, band, or credit association, may be reloaned by it, with the approval of the Commissioner or his authorized representative, but the Commissioner may authorize such lenders to approve applications for particular types of loans up to a specified amount.

(b) Such loans shall be secured by such securities as the lender and the approving officer may require. Individually owned trust or restricted land may be mortgaged for such loans in accordance with § 121.52 of this chapter. All securing documents shall be filed or recorded in accordance with State or Territorial law.

(c) Unless otherwise authorized by the Commissioner in the case of particular loans, title to property purchased with such loans received from such relending organizations shall be taken in the name of the borrower.

Public Law 83-280, 67 Stat. 588 (1953).

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Represen-

tatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2, Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject

to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3 Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of Indian Country Affected

California.....All Indian country within the State

Minnesota.....All Indian country within the State, except the Red Lake Reservation

Nebraska.....All Indian country within the State

Oregon.....All Indian country within the State, except the Warm Springs Reservation

Wisconsin.....All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That

the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

Executive Order:

Executive Order Dated July 2, 1872

EXECUTIVE MANSION
Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT

A-13

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

CONSTITUTION AND BY-LAWS
OF THE
CONFEDERATED TRIBES
OF THE COLVILLE RESERVATION

APPROVED FEBRUARY 26, 1938

PREAMBLE

We, the people of the Colville Reservation in the State of Washington, in order to form a recognized representative council to handle our Reservation affairs, and in order to improve the economic condition of ourselves and our posterity, do hereby establish this Constitution and By-Laws.

ARTICLE I — PURPOSE

The object and purpose shall be to promote and protect the interests of the Colville Indians and to preserve peaceful and cooperative relations with the Office of Indian Affairs, its officers and appointees.

ARTICLE II — GOVERNING BODY

Section 1. The governing body of the Confederated Tribes of the Colville Reservation shall be a council known as the Colville Business Council.

Section 2. The Business Council shall consist of fourteen (14) Councilmen to be elected from the districts as set forth hereafter.

Section 3. The representation from the districts hereby designated shall be as follows: Inchelium district, four councilmen; Nespelem district, four councilmen; Omak district, four councilmen; Keller district, two councilmen.

Section 4. The Business Council shall have the power to change the districts and the representation from each district based upon community organization or otherwise, as deemed advisable, such change to be made by ordinance,

but the total number of councilmen shall not be changed, as provided for in Section 2 of Article II of this Constitution.

Section 5. The Business Council so organized shall elect from within its own number (1) a chairman; (2) a vice-chairman; and from within or without its own membership (3) a secretary; and may appoint such other officers and committees as may be deemed necessary.

Section 6. No person shall be a candidate for membership in the Business Council unless he shall be a member of the Confederated Tribes of the Colville Reservation and shall have resided in the district of his candidacy for a period of one year next preceding the election, and be at least twenty-five (25) years of age.

Section 7. The Business Council of the Confederated Tribes of the Colville Reservation shall be the sole judge of the qualifications of its members.

ARTICLE III — NOMINATIONS AND ELECTIONS

Section 1. The first election of the Business Council under this Constitution shall be called, held and supervised by the Superintendent of the Reservation and the delegates who were selected by the Districts and who prepared this constitution, within sixty days after its ratification and approval.

At the first election, the two candidates receiving the highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve two years; the candidate receiving the highest number of votes in the Keller district shall serve two years. The two candidates receiving the next highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve one year; and the candidate receiving the next highest number of votes in the Keller district shall serve one year. Thereafter, elections for the Business Council shall be held every year and shall be called at least sixty days before expiration of the term of office.

The terms of office of a councilman shall be for a period of two years, unless otherwise provided herein.

Section 2. The Business Council, or an election board appointed by the Council, shall determine rules and regulations governing all elections.

Section 3. Any qualified member of the Confederated Tribes may announce his candidacy for the Business Council within the district of his residence, in accordance with Section 6 of Article II.

Section 4. The Business Council, or a board appointed by the Business Council, assisted by the Superintendent of the Reservation, shall certify to the election of the Business Council members within five days after election returns.

Section 5. Any enrolled member of the Confederated Tribes of the Colville Reservation who is twenty-one (21) years of age or over shall be entitled to vote.

ARTICLE IV — VACANCIES AND REMOVAL FROM OFFICE

Section 1. If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the Reservation, or shall be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State, or Federal Court, the Business Council shall declare the position vacant and the district affected shall elect to fill the unexpired term. (*This Section amended. See Amendment II.*)

Section 2. The Business Council may by majority vote expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken in the matter, such member or official shall be given a written statement of the charges against him at least five days before the meeting of the Business Council before which he is to appear, and he shall be given an opportunity to answer any and all charges at the designated Council meeting. The decisions of the Business Council shall be final.

Section 3. Upon receipt of a petition signed by one-third (⅓) of the eligible voters in any district calling for the recall of any member of the Council representing said district, it shall be the duty of the Council to call an election on such recall petition.

No members may be recalled in any such election unless at least 40% of the legal voters of the district shall vote in such election. *(This Section amended. See Amendment IV.)*

ARTICLE V — POWERS AND DUTIES OF THE COUNCIL

Section 1. The Business Council shall have the following powers, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached By-Laws;

(a) To confer with the Commissioner of Indian Affairs or his representatives and recommend regarding the uses and disposition of tribal property; to protect and preserve the Tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian Arts, crafts, and culture; to administer charity, to protect the health, security, and general welfare of the Confederated Tribes.

(b) To exclude from the restricted lands of the Reservation persons not legally entitled to reside thereon, under ordinances which may also be subject to review by the Secretary of the Interior.

(c) To recommend and help to regulate the inheritance of real and personal property, other than allotted lands, within the Colville Reservation.

(d) To regulate the domestic relations of members of the Confederated Tribes.

(e) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon non-members doing business within the Reservation, or obtaining special rights or privileges, and the same may be applied to mem-

bers of the Tribes provided such ordinances have been approved by a referendum of the Confederated Tribes.

Article VI — Amendments

This Constitution and By-Laws may be amended by a majority of the qualified voters of the Confederated Tribes voting at an election called for that purpose. Provided, that the Tribal Council shall have adopted the amendment by a two-thirds (⅔) vote, but no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

CONSTITUTIONAL AMENDMENTS

Amendment I

Article II, Section 1, By-Law: Time and Place of Meeting and Procedure—Regular meetings of the Business Council shall be held on the second Thursday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. (*Adopted by Confederated Tribes June* 15, 1946. *Approved by Acting Commissioner of Indian Affairs May* 8, 1947.)

Amendment II

Article IV, Section 1. Vacancies and Removal From Office.—If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the reservation, or shall be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State or Federal court, the Business Council shall declare the position vacant and appoint a member from the district affected to fill the unexpired term. (*Adopted by Confederated Tribes June* 15, 1946. *Approved by Acting Commissioner of Indian Affairs* May 8, 1947.)

Amendment III

Article VII, Membership of the Confederated Tribes of the Colville Reservation.—There shall be added a

new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

Section 1.—The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

Section 2. The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the

adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotments or inherited interests. (*Adopted by Confederated Tribes May 20, 1949. Approved by Commissioner of Indian Affairs April 14, 1950.*)

AMENDMENT IV

That Section 3, of ARTICLE IV, VACANCIES AND REMOVAL FROM OFFICE, is hereby amended to read:

Section 3. By the eligible voters of any district filing with the Colville Business Council a typewritten or printed petition, signed by at least one-third (⅓) the number of those who were eligible to vote in the last preceding election, charging that a council member representing such district has violated his oath of office or committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, a demand may be made for a recall of such council member provided the act or acts complained of are set forth in concise language and the signature of each petitioner has alongside it those of two witnesses thereto and the petitioner's post office address.

The Council shall, at its next meeting after the filing of such petition, determine whether the petition as filed meets the requirements of this section of the Constitution and if it finds that such requirements have been complied with, shall call a special election on such recall petition, said election to be held not sooner than 30 days after the action of the Council on the petition nor more than 60 days after the date of such Council action.

The ballot to be voted on at such special election shall contain the charging part of the petition hereinabove referred to.

No member may be recalled at any such election unless at least forty percent (40%) of the eligible voters of the district shall have voted at such election and unless a majority of those voting vote in favor of recall. (*Adopted by Confederated Tribes May* 9, 1959. *Approved by Acting Commissioner of Indian Affairs July* 2, 1959.)

Amendment V

There shall be added to Amendment III, Membership of the Confederated Tribes of the Colville Reservation, a new provision governing membership of the said tribes which shall read as follows:

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (¼) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. (*Adopted by the Colville Confederated Tribes on* May 9, 1959. *Approved by the Acting Commissioner of Indian Affairs July* 2, 1959).

BY-LAWS OF THE CONFEDERATED TRIBES

Article I — The Business Council

Section 1. *Chairman of the Business Council.* The Chairman of the Business Council shall preside over all meetings of the Business Council. He shall perform all duties of the

Chairman and exercise authority delegated to him by the Business Council. He shall vote only in the case of a tie.

Section 2. Vice-Chairman of the Business Council. The Vice-Chairman of the Business Council shall assist the Chairman when called upon to do so. In the absence of the Chairman, he shall preside. When so presiding, he shall have the rights, privileges and duties as well as the responsibilities of the Chairman.

Section 3. Secretary of the Business Council. The Secretary of the Business Council shall conduct all correspondence and keep a complete and accurate record of all matters transacted at Council Meetings. It shall be his duty to submit promptly to the Superintendent of the jurisdiction copies of all minutes of regular and special meetings of the Business Council and the Tribes.

Section 4. Appointive Officers. The duties of all appointive committees and officers appointed by the Colville Business Council shall be clearly defined by resolution of the Business Council at the time of their creation or appointment. Such committees and officers shall report from time to time as required, to the Business Council and their activities and decisions shall be subject to review by the Business Council upon petition of any person aggrieved.

Article II — Time and Place of Meetings and Procedure

Section 1. Regular meetings of the Business Council shall be held on the second Friday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. (*This section amended. See Amendment I.*)

Special meetings may be called by written notice signed by the Chairman or by a majority of the Business Council members, and when so called the Business Council shall have power to transact business as in regular meetings.

Section 2. — Quorum. No business shall be transacted unless a quorum is present. A quorum shall consist of eight (8) councilmen.

Section 3. — *Order of Business.* The following order of business is established for all meetings:

1. Call to order by the Chairman.
2. Roll call.
3. Ascertainment of a Quorum.
4. Reading of the minutes of the last meeting.
5. Adoption of the minutes by a vote or common consent.
6. Unfinished business.
7. New Business.
8. Adjournment.

Section 4. — *Report of Meetings.* It shall be the duty of each member of the Business Council to make reports concerning the proceedings of the Business Council to the members of the district from which he is elected.

Article III — Ratification of Constitution and By-Laws

This Constitution and By-Laws shall be in full force and effect whenever a majority of the adult voters of the Confederated Tribes voting at an election called by the Commissioner of Indian Affairs, in which at least thirty percent (30%) of the eligible voters vote, shall have ratified such Constitution and By-Laws and the Commissioner of Indian Affairs shall have approved same.

CERTIFICATION OF ADOPTION

Pursuant to the request of a majority of the Indians of the Colville Reservation to obtain for themselves a representative organization, this Constitution and By-Laws was duly submitted by the Commissioner of Indian Affairs to the adult Indians living on the Reservation for ratification and was on February 26, 1938, duly ratified by a vote of 503 for, and 76 against in an election in which over 30 percent of those entitled to vote cast their ballots.

/Signed/ Harvey K. Meyer
Superintendent, Colville Agency

/Signed/ Gus Whitelaw
Chairman,
Constitutional Committee

This is a true and correct copy of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation. Issued: August 1, 1967

/Signed/ HARRY OWHI
Executive Secretary

RESOLUTION 1972-375
Colville Tobacco Ordinance as Amended

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Reservation, and

WHEREAS, under the Constitution and Bylaws of the Tribes the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, by virtue of their status as Indian tribes, the Colville Confederated Tribes are authorized by federal law to possess unstamped cigarettes and other tobacco products on the Colville Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Colville Business Council deems it essential to the health, security and general welfare of the Colville Confederated Tribes to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Colville Indian Reservation,

NOW, THEREFORE, the Colville Business Council does hereby promulgate and enact the following ordinance:

AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products
within the Colville Indian Reservation

Section 1. Title.

This ordinance shall be known as the Colville Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(1) "Tribes" shall mean the Confederated Tribes of the Colville Indian Reservation.

(2) "Council" shall mean the Colville Business Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(6) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribes together with all freight charges and other expenses incurred by the Tribes in their receipt and distribution.

(7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

(8) "Operator" shall mean an enrolled member of the Colville Confederated Tribes licensed by the Tribes to manage a tobacco outlet.

Section 3. Establishment of Tobacco Outlets.

The Council shall establish one or more tobacco outlets

within the Colville Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

Section 4. Nature of Outlet.

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed by the Tribes by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

Section 5. Application for Tobacco Outlet License.

Any enrolled member of the Colville Confederated Tribes may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

Section 6. Tobacco Outlet License.

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a one-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Colville Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

Section 7. Traders License.

No tobacco outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's License from the Superintendent of the Colville Indian Agency. Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

Section 8. Excise Tax Imposed.

There is levied and there shall be collected as hereinafter provided, a tax upon the distribution of all cigarettes sold or distributed hereunder in the amount of three cents per package. The Council may levy an additional tax

upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges. The excise tax levied hereunder shall be added to the retail selling price of tobacco products sold to the ultimate consumer.

Section 9. Purchase by Tribes.

All tobacco products purchased by the Tribes pursuant hereto shall be purchased with federally-restricted tribal funds.

Section 10. Wholesale Distribution.

Wholesale distribution of tobacco products by the Tribes to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

Section 11. Tobacco Products Federally Restricted Tribal Property.

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property owned and possessed by the Tribes until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price as provided in Section 10 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

Section 12. Remuneration to Operator.

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

Section 13. Restricted Sales to Non-Indians.

An operator may not sell more than two cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

Section 14. Restricted Sales to Minors.

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 15. Other Business by Operator.

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribes. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 16. Tribal Immunity—Liability—Credit.

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribes from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribes or to utilize tribal credit.

Section 17. Operating Without License.

No person shall operate a tobacco outlet on the Colville Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

Section 18. Purchases.

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribes.

Section 19. Liability Insurance.

An operator shall maintain liability insurance upon his premises in the sum of not less than $25,000.00.

Section 20. Revocation of Tobacco Outlet License.

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the

operator's tobacco outlet license as well as enforcement of the penalties provided in Section 21 below.

Section 21. Violation—Penalties.

Any person violating the provisions of this ordinance shall be guilty of an offense and subject to a fine in Tribal Court of not less than $50.00 nor more than $250.00 and forfeiture of all of the Tribes' remaining stock of tobacco products distributed hereunder and situate in his tobacco outlet. The tribal law enforcement officers shall be empowered to seize forfeited tobacco products.

Section 22. Separability.

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or application of the provision to other persons or circumstances is not affected.

THE FOREGOING was duly enacted by the Colville Business Council meeting in special session this 23rd day of June, 1972, at the Colville Indian Subagency, Nespelem, Washington, by a vote of 10 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Contitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:

/s/ MEL TONASKET
Mel Tonasket, Chairman
Colville Business Council

State Statutes:

Revised Code of Washington:

82.24.050 Duty of retailer

Every retailer shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps

affixed to represent the tax imposed herein: *Provided*, That those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations, without affixing the stamps required by this chapter. [Amended by Laws 1st Ex Sess 1969 ch 214 § 2.]

82.24.110 Other offenses—Penalty. Each of the following acts is a gross misdemeanor and punishable as such:

(1) To sell, except as a registered wholesaler or retailer engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;

(2) To use, or have in possession knowingly or intentionally any forged or counterfeit stamps;

(3) For any person other than the tax commission or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(4) To violate any of the provisions of this chapter;

(5) To violate any lawful rule or regulation made and published by the tax commission;

(6) To use any stamps more than once;

(7) To refuse to allow the tax commission or any duly authorized agent thereof, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;

(8) For any retailer, except one permitted to maintain an unstamped stock to engage in interstate business as provided herein, to have in possession in any place of business any of the articles herein [illegible]d, unless the same have the proper stamps attached;

(9) For any person to make, use, or prevent or exhibit to the tax commission or any duly authorized agent thereof, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;

(10) For any wholesaler or retailer or his agents or employees to fail to produce on demand of the tax commission all invoices of all the articles herein taxed or stamps bought by him or received in his place of business within five years prior to such demand unless he can show by satisfactory proof that the non-production of the invoices was due to causes beyond his control;

(11) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein.

All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses herein described shall be guilty and punishable as principals, to the same extent as any wholesaler or retailer violating the provisions thereof.

82.32.030 Registration certificates. If any person engages in any business or performs any act upon which a tax is imposed by the preceding chapters, he shall, whether taxable or not, under such rules and regulations as the commission shall prescribe, apply for and obtain from the commission, upon payment of a fee of one dollar, a registration certificate. Such registration certificate shall be personal and nontransferable and shall be valid as long as the taxpayer continues in business and pays the tax accrued to the state. In case business is transacted at two or more separate places by one taxpayer, a separate registration certificate for each place at which business is transacted

with the public shall be required, but, for such additional certificates no fee shall be required. Each certificate shall be numbered and shall show the name, residence, and place and character of business of the taxpayer and such other information as the tax commission deems necessary and shall be posted in a conspicuous place at the place of business for which it is issued. Where a place of business of the taxpayer is changed, the taxpayer must return to the commission the existing certificate, and a new certificate will be issued for the new place of business free of charge. No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section, except that the commission, by general regulation, may provide for the issuance of certificates of registration to temporary places of business without requiring the payment of any fee.

82.32.210 Tax warrant—Levy upon property—Revocation of certificate of registration

If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the tax commission may issue a warrant under its official seal directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of such warrant, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant, plus the cost of executing the warrant, and return the warrant to the commission and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. If, however, the commission believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may

declare the tax or penalty to be immediately due and payable and may issue a warrant immediately.

If any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of the superior court, or if any taxpayer shall, for three consecutive reporting periods, be delinquent in the transmission to the commission of retail sales tax collected by him, the tax commission may by order issued under its official seal, revoke the certificate of registration of the taxpayer against whom the warrant was issued, and, if such order is entered, a copy thereof shall be posted in a conspicuous place at the main entrance to the taxpayer's place of business and shall remain posted until such time as the warrant has been paid. Any certificate so revoked shall not be reinstated, nor shall a new certificate of registration be issued to the taxpayer, until the amount due on the warrant has been paid, or provisions for payment satisfactory to the commission have been entered, and until the taxpayer has deposited with the commission such security for payment of any taxes, increases, and penalties, due or which may become due in an amount and under such terms and conditions as the commissioner may require, but the amount of the security shall not be greater than one-half the estimated average annual liability of the taxpayer. [Amended by Laws 1st Ex Sess 1967 ch 89 §3, effective June 1, 1967.]

82.32.240 Tax constitutes debt — Priority of Lien. Any tax due and unpaid and all increases and penalties thereon, shall constutute a debt to the state and may be collected by court proceedings in the same manner as any other debt in like amount, which remedy shall be in addition to any and all other existing remedies.

In all cases of probate, insolvency, assignment for the benefit of creditors, or bankruptcy, involving any taxpayer, the claim of the state for said taxes and all increases and penalties thereon shall be a lien upon all real and per-

sonal property of the taxpayer, and the mere existence of such cases or conditions shall be sufficient to create such lien without any prior or subsequent action by the state, and in all such cases it shall be the duty of all administrators, executors, guardians, receivers, trustees in bankruptcy or assignees for the benefit of creditors, to notify the tax commission of such administration, receivership or assignment within thirty days from the date of their appointment and qualification.

The lien provided for by this section shall attach as of the date of the assignment for the benefit of creditors or of the initiation of the probate, insolvency, or bankruptcy proceedings: *Provided,* That this sentence shall not be construed as affecting the validity or priority of any earlier lien that may have attached previously in favor of the state under any other section of this title.

Any administrator, executor, guardian, receiver or assignee for the benefit of creditors not giving the notification as provided for above shall become personally liable for payment of the taxes and all increases and penalties thereon.

82.32.290 Unlawful acts—Penalties. It shall be unlawful for any person to engage in business without having obtained a certificate of registration as provided herein; or to engage in business after his certificate of registration has been revoked by order of the tax commission; or to tear down or remove any order or notice posted by the commission; or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof; or for any person to aid or abet another in any attempt to evade the payment of such tax or any part thereof; or for the president, vice president, secretary, treasurer, or other officer of any company to make or permit to be made for any company any false return, or any false statement in any return, with intent to evade payment of any tax here-

under; or for the president, vice president, secretary, treasurer, or other officer of any company to carry on the business of any company which has not obtained a certificate of registration or whose certificate of registration has been revoked by order of the commission; or for any purchaser to fraudulently sign a resale certificate without intent to resell the property purchased; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commission or its duly authorized agent; or to fail or refuse to permit the inspection or appraisal of any property by the commission or its duly authorized agent; or to refuse to offer testimony or produce any record as required.

Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor.

In addition to the foregoing penalties, any person who knowingly swears to or verifies any false or fraudulent return, or any return containing any false or fraudulent statement with the intent aforesaid, shall be guilty of the offense of perjury in the second degree; and any company for which a false return, or a return containing a false statement, as aforesaid, is made, shall be punished, upon conviction thereof, by a fine of not more than one thousand dollars. All penalties or punishments provided in this section shall be in addition to all other penalties provided by law.

Washington Laws, 1972 1st Ex. Sess.

CHAPTER 157

[Engrossed House Bill No. 44]

TAX ON CIGARETTES

AN ACT Relating to revenue and taxation; amending section 28A.47.440; chapter 223, Laws of 1969 ex. sess. as amended by section 1, chapter 70, Laws of 1971 ex. sess., and RCW 28A.47.440; amend-

ing section 2, chapter 272, Laws of 1959 as amended by section 2, chapter 299, Laws of 1971 ex. sess. and RCW 73.32.130; amending section 82.24.020, chapter 15, Laws of 1961, as last amended by section 13, chapter 299, Laws of 1971 ex. sess. and RCW 82.24.020; amending section 82.24.080, chapter 15, Laws of 1961 and RCW 82.24.080; amending section 82.24.130, chapter 15, Laws of 1961 and RCW 82.24.130; adding new sections to chapter 15, Laws of 1961 and to chapter 82.24 RCW; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 28A.47.440, chapter 223, Laws of 1969 ex. sess. as amended by section 1, chapter 70, Laws of 1971 ex. sess. and RCW 28A.47.440 are each amended to read as follows:

In addition to the taxes levied by RCW 73.32.130 and 82.24.020, there is levied and shall be collected by the department of revenue from the persons mentioned in and in the manner provided by chapter 82.24 RCW, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling, *possession* or distribution of cigarettes in an amount equal to the rate of one-half mill per cigarette, but the provisions of RCW 82.24.070 allowing dealers' compensation for affixing stamps shall not apply to this additional tax. Instead, wholesalers and retailers subject to the provisions of chapter 82.24 RCW shall be allowed as compensation for their services in affixing the stamps for the additional tax required by this section a sum equal to one-half of one percent of the value of the stamps for such additional tax purchased or affixed by them. Wholesalers and retailers subject to the payment of this tax may, if they wish, absorb such additional tax and not pass it on to purchasers without being in violation of this section or any other act relating to the sale or taxation of cigarettes.

Revenues derived from the tax imposed by this section shall be transmitted by the department of revenue to the state treasurer in accordance with the provisions of RCW 82.32.320, to the credit of the public schools building bond redemption fund. The amount so deposited in the aforesaid fund shall be devoted exclusively to payment of interest on and to retirement of the bonds authorized by RCW 28A.47.420.

As additional security for the payment of the bonds herein authorized, all revenues derived from the tax imposed by RCW 82.24.020 over and above the amount required by RCW 73.32.130 to be paid into and retained in the war veterans' compensation bond retirement fund shall be paid into the public schools building bond redemption fund and shall be devoted exclusively to the payment of interest on and to retirement of the bonds authorized by RCW 28A.47.420: PROVIDED, That whenever the receipts into the public schools building bond redemption fund from all sources during any one year exceed the annual amounts required for debt service, the balance shall be transferred by the state treasurer to the state general fund.

Sec. 2. Section 2, chapter 272, Laws of 1959 as amended by section 2, chapter 299, Laws of 1971 ex. sess. and RCW 73.32.130 are each amended to read as follows:

For the purpose of creating the fund for the retirement of such bonds upon maturity and the payment of interest thereon as it falls due, all proceeds hereafter received from the excise tax on cigarettes imposed by chapter 82.24 as now or hereafter amended, shall, so long as any part of principal or interest of the bonds herein provided for remains outstanding, be paid in to the war veterans' compensation bond retirement fund hereinafter provided for.

In addition thereto, there is hereby levied and there shall be collected by the department of revenue from the persons mentioned in and in the manner provided by chapter

82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling, *possession* or distribution of cigarettes in an amount equal to the rate of one mill per cigarette, but the provisions of RCW 82.24.070 allowing dealers' compensation for affixing stamps shall not apply to this additional tax. Instead, wholesalers and retailers subject to the provisions of chapter 82.24 shall be allowed as compensation for their services in affixing the stamps for the additional tax required by this section a sum equal to one percent of the value of the stamps for such additional tax purchased or affixed by them.

All money derived from such tax shall be paid to the state treasurer and credited to a special trust fund to be known as the war veterans' compensation bond retirement fund, which shall be kept segregated from all money in the state treasury and shall, while any of the bonds herein authorized or any interest thereon remain unpaid, be available solely for the payment thereof.

Whenever the receipts into the war veterans' compensation bond retirement fund during any year exceed the annual amounts required for debt service, the balance shall be transferred by the state treasurer to the state general fund, and whenever there has accumulated in the war veterans' compensation bond retirement fund a sum in excess of the amount required in any year, as determined by the state finance committee, to meet obligations during that year for bond retirement and interest, the state treasurer shall transfer from such fund to the state general fund all money in excess of such amount.

Sec. 3. Section 82.24.020, chapter 15, Laws of 1961, as last amended by section 13, chapter 299, Laws of 1971 ex. sess. and RCW 82.24.020 are each amended to read as follows:

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, *possession* or distribution of all cigarettes, in an

amount equal to the rate of six and one-half mills per cigarette. *For purposes of this section, and for purposes of RCW 28.47.440 and 73.32.130, "possession" shall mean both (1) physical possession by the purchaser and, (2) when cigarettes are being transported to or held for the purchaser or his designee by a person other than the purchaser, constructive possession by the purchaser or his designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.*

Sec. 4. Section 82.24.080, chapter 15, Laws of 1961 and RCW 82.24.080 are each amended to read as follows:

It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, *possessed,* or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, *possesses (either physically or constructively, in accordance with RCW 82.24.020)* or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles herein taxed is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, *possessed,* or distributed in this state.

It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state: PROVIDED, HOWEVER, That failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

Sec. 5. Section 82.24.130, chapter 15, Laws of 1961 and RCW 82.24.130 are each amended to read as follows:

Subject to the provisions of section 6 of this 1972 amendatory act, any articles taxed herein found at any point within this state, which articles shall be held, owned [,] *or* possessed [, or in the control of any person for a period of time longer than the time necessary to affix the stamps]

by any person, and not having the stamps affixed to the package or containers are hereby declared to be contraband goods, and may be seized by the [commission] *department of revenue,* or its duly authorized agent, or by a peace officer of the state, when directed by the [commission] *department of revenue* so to do, without a warrant, and said goods shall be offered by the [commission] *department of revenue* for sale at public auction to the highest bidder after due advertisement, but the [commission] *department of revenue* before delivering any of the goods so seized shall require the person, to whom such articles are sold, to affix the proper amount of stamps. The proceeds of sale of any goods sold hereunder shall be paid to the [commission] *department of revenue.*

The cost of seizure and sale shall be paid out of the proceeds derived from the sale before making remittance.

Any vending machine and any vehicle, not a common carrier, which may be used for the purpose of violating the provisions of this chapter shall likewise be subject to seizure and sale in the same manner.

Notwithstanding the foregoing provisions of this section, articles taxed herein which are in the possession of a wholesaler or retailer, licensed by the department, pursuant to the provisions of chapter 19.91 RCW for a period of time necessary to affix the stamps after receipt of the articles, shall not be considered contraband.

New Section. *Sec. 6.* There is added to chapter 15, Laws of 1961 and to chapter 82.24 RCW a new section to read as follows:

Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the cigarettes

so transported. If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer licensed pursuant to the provisions of chapter 19.91 RCW, the United States or an agency thereof, and any Indian tribal organization authorized [by the department] to possess unstamped cigarettes. V

New Section. *Sec.* 7. There is added to chapter 15, Laws of 1961 and to chapter 82.24 RCW a new section to read as follows:

Notwithstanding any other provisions of this chapter, a person may acquire and physically possess, if acquired and

possessed for purposes other than resale, four hundred or less cigarettes at any single time without incurring tax liability under this chapter, RCW 28A.47.440 and RCW 73.32.130.

New Section. *Sec. 8.* If any provision of this 1972 amendatory act, or its application to any person or circumstance is held invalid, the remainder of this 1972 amendatory act, or the application of the provision to other persons or circumstances is not affected.

New Section. *Sec. 9.* This 1972 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House January 29, 1972.

Passed the Senate February 19, 1972.

Approved by the Governor February 27, 1972 with the exception of one item in section 6 which is vetoed.

Filed in Office of Secretary of State February 28, 1972.

Note: Governor's explanation of partial veto is as follows:

Veto Message

". . . There has recently developed between the taxing authority of this state and certain Indian people a conflict, undesired by all parties, over the permissible scope of the state taxing authority as it relates to the sale of cigarettes in this state. More particularly, certain Indian people selling cigarettes on reservations have alleged that federal law relieves them of the state imposed duty to collect the cigarette excise tax upon sales to non-Indians. These allegations have been acted upon and the matter is presently in litigation.

This bill is an attempt to eliminate this controversy by interposing the authority of the state at points removed

from the reservations. To achieve this result the bill provides that the tax is imposed upon the first taxable event occurring in this state (section 4) and denominates as contraband any untaxed cigarettes which are not consigned to, or in the possession of, a person authorized to possess untaxed cigarettes (sections 5 and 6). Included among persons authorized to possess untaxed cigarettes are '. . . any Indian tribal organization authorized by the department to possess unstamped cigarettes.' (Section 6.) In addition, Section 7 legitimatizes individual possession of two cartons or less of unstamped cigarettes if held for personal use, thus legitimatizing to that extent non-Indian purchases from Indian sellers who have not collected the tax otherwise due from such buyers.

Serious questions have been raised about the propriety of the above-quoted portion of section 6. On its face, it purports to render dependent upon department approval even those sales of cigarettes by Indians to Indians when they are occupying their own trust land over which the state has not assumed full jurisdiction. It is highly doubtful that the state possesses authority thus to regulate inter-Indian on-reservation trade taking place on trust land where the state has not assumed full jurisdiction pursuant to chapter 37.12 RCW. It is equally doubtful that the legislature wished to make the attempt and particularly so if this condition to sale is viewed as an attempt to require an additional license of federal Indian traders.

If reference is had to Laws 1969, 1st ex. sess., ch. 214, sec. 1, it will be noted that the state has already assumed authority to determine which tribes, if any, may obtain untaxed cigarettes. A reading of this 1969 act makes clear that the phrase 'authorized by the department' in House Bill 44 is not intended to constitute a new grant of authority. It is instead, merely an internal reference to the powers already assumed under Laws 1969, 1st ex. sess., ch. 214, sec. 1. As such it is at best surplusage. But at

worst it may be mistaken for a grant of authority to the department to regulate inter-Indian reservation sales. For this reason, I have vetoed the item 'by the department' in the last paragraph of section 6.

By taking this action the bill authorizes possession of unstamped cigarettes by '. . . any Indian tribal organization authorized to possess unstamped cigarettes.' As such, the bill in no way can be said to interfere with pending litigation in this area in which Indian sellers are claiming such authorization under federal law. The question of which tribes are so authorized, and the source of any such authority, is thus not answered by this bill. Whether Laws 1969, 1st ex. sess., ch. 214, sec. 1, effectively grant the department this authority, and if so, to what extent, is not answered. Through this veto, however, that issue is not raised in House Bill 44; House Bill 44 ceases to be construable as granting any such authority to the department, and those claiming the invalidity of such grant are referred directly to its source, i.e., Laws 1969, 1st ex. sess., ch. 214, sec. 1.

I think it especially important to make two observations about this legislation a part of this communication. First, this legislation does not attempt, as has been reported, to impose any state taxes on the reservation and it actually legitimatizes untaxed sales in limited quantities to non-Indian buyers by Indian sellers. Second, it is my opinion that the question of the proper source of any tribal authorization to possess unstamped cigarettes, as raised in this act, should be judicially determined.

With he exception of the one item referred to above, the remainder of House Bill 44 is approved."

COPY BOUND C

B-1

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

[illegible] 1965

February 28, 1972
(Date)

BE IT KNOWN, That Leonard Tonasket, trading under the name and firm of Stozie Shop, is (are) hereby

LICENSED

to conduct a Commercial Business at East Omak, within the Colville Reservation, Okanogan County, WA, for a term of 10 years from February 28, 1972, and is (are) authorized to employ two (2) persons of his choice.

In consideration of the granting of this license, and by the acceptance thereof, the said licensee (or licensees) expressly warrants that all applicable Federal, State, and Tribal laws and regulations will be fully complied with in all respects, and that authorized license fees, charges, etc., will be paid; and failure so to do, he (or they) shall be subject to the penalty of the forfeiture of this license and such further action as the law and facts may justify; and the licensee (or licensees) waives all claim against the Government for loss or damage which may result from any cause whatever during the term of this license or his (or their) presence on the reservation in pursuance thereof.

This license is revocable at any time in the discretion of the Commissioner of Indian Affairs or his authorized representative for any cause deemed sufficient by him.

W. Sherwood Broadhead
(Superintendent – Agency)

(Strike out inapplicable words)

89349

OSE IN CENTER

B-2

COLVILLE TRIBAL TOBACCO OUTLET LICENSE

The Colville Business Council of the Colville Confederated Tribes of the Colville Reservation, Washington, hereby licenses Leonard Tonasket to operate Tobacco Outlet No. 1 on behalf of the Colville Confederated Tribes, pursuant to Colville Tobacco Ordinance, Resolution 1972--125 for a one-year period on the following-described premises:

"Stogie Shop" located on Allottment 8-700, East Omak, Washington

All tobacco products on the above-described premises are the federally-restricted property of the Colville Confederated Tribes and may not be removed from the premises except in the course of ordinary sale without the express permission of the Colville Business Council.

DATED May 25, 1972

COLVILLE BUSINESS COUNCIL

By: Mel Tonasket
Chairman

APPENDIX C

IN REPLY REFER TO:

Tribal Operations

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
PORTLAND AREA OFFICE
POST OFFICE BOX 3785
PORTLAND, OREGON 97208

AUG 4 1972

Mr. Robert L. Pirtle
Ziontz, Pirtle & Morisset
Attorneys at Law
3101 Seattle-First National Bank Building
Seattle, Washington 98104

Dear Mr. Pirtle:

There are twenty-four federally recognized Indian Tribes in the State of Washington. Of these twenty-four tribes, twenty-one have formal organizational documents that have been recognized or approved by the Secretary of the Interior or the Commissioner of Indian Affairs. Of the twenty-one formally organized tribes, four have substantial income. Because of their historical approach to government, three of these four tribes pay out large portions of their income in dividends to their membership. The remaining eighteen tribes have insufficient income to finance governmental operations.

The daily pressures on tribal governments for economical development and social programs make it difficult for them to adequately finance normal governmental activities and responsibilities in all areas.

While tribes possess the inherent right to tax to finance governmental operations, economics of reservation areas have been a strong deterrent to that approach. Increasing pressures for reservation development programs and unwarrented encroachments by state and local governments on tribal prerogatives have resulted in complete reanalysis of governmental responsibilities by tribal governing bodies.

In the last seven years, ten tribes have begun to exercise taxing authorities in order to more adequately meet the needs of their governmental operations. Their more recent activities in this regard are in the field of taxing tobacco products.

It is the opinion of this office that all these tribes must move more fully into the area of taxation consistent with tribal prerogatives if they are to be able to adequately develop tribal governments to the extent necessary to meet the growing demands in the Indian field.

Sincerely yours,

Area Director

Enclosure

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,

Appellant

v.

THE STATE OF WASHINGTON AND THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON

Appellees

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

INTEREST OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE

Appellant and Appellees have filed with the Clerk of this Court a written stipulation consenting to the filing of this brief. Amicus has a considerable interest in the outcome of this case and is particularly qualified in the specialized area of Indian law.

Native American Rights Fund (hereinafter referred to as the "Fund") is a private, non-profit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance to Indians. Because of the Fund's expertise on Indian law, the Fund also provides counsel to legal services

programs on Indian legal matters under a contract with the Office of Economic Opportunity. The Fund participates as amicus curiae in this case because of the impact the decision in this case will have on the scope of Federal supervision of Indian tribes located in states which have assumed criminal and civil jurisdiction over certain Indian reservations.

STATEMENT

The Colville Confederated Tribes comprise eleven separate tribes of Indians which formerly occupied large areas of Eastern Washington until they were placed upon the Colville Indian Reservation established by Executive Order of the President of the United States in 1872. The tribes are recognized by the United States Government, Bureau of Indian Affairs, and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938. The Colville Indian Reservation encompasses 1.3 million acres and is governed by the fourteen member Colville Business Council.

In 1963, Leonard Tonasket, a full-blooded enrolled member of the Colville Confederated Tribes, leased a store in East Omak on the Colville Indian Reservation and established a retail business, selling cigarettes and other merchandise. On April 9, 1964, Leonard Tonasket applied to the Tribal Loan Office for a loan of federally restricted trust funds in the sum of $1,000 specifically for the purchase of a larger cigarette inventory. The Bureau of Indian Affairs for the Portland Area Office approved the cigarette inventory loan in the sum of $800 and a mortgage upon Mr. Tonasket's trust allotment S-2026 was given to secure the loan, all pursuant to the provisions of 25 C.F.R. §§ 91.12 *et seq.* Thereafter, Leonard Tonasket borrowed an additional $6,000 from the Tribal Loan Office with which to construct

a new store building on his trust allotment to expand his retail business.

Because he is a full-blooded enrolled member of the Colville Confederated Tribes operating a retail store on his trust land as a Federal Indian trader within the meaning of 25 U.S.C. § 261 *et seq.* and because he was utilizing Federally restricted funds, Leonard Tonasket did not register with the State of Washington or affix tax stamps to cigarettes in his possession and being sold in his business.

In February of 1967, agents of the Washington Tax Commission entered the Colville Indian Reservation, seized a great number of cigarettes from Leonard Tonasket's trust land, and placed him under arrest for failing to register with the Tax Commission in violation of RCW 82.32.030 and RCW 82.32.290, possessing unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110, and selling unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110.

As a result of the action of the Washington Tax Commission, Leonard Tonasket commenced an action in the Superior Court for Thurston County requesting a judgment declaring that he be entitled to operate his retail business on his trust land on the Colville Indian Reservation free from the provisions of the State excise statutes or from State interference, and for a judgment requiring the State of Washington to return all cigarettes illegally confiscated from his trust land. On October 7, 1968, the Superior Court of the State of Washington granted judgment in favor of the State of Washington. On September 2, 1971, the Supreme Court of the State of Washington affirmed the Superior Court's ruling. On November 15, 1971, the Supreme Court of the

State of Washington issued its *remittitur* to the Superior Court enforcing the written opinion of the court.

On December 10, 1971, appellant filed, in the Supreme Court of the State of Washington, a Notice of Appeal to this Court, which noted probable jurisdiction on June 12, 1972.

ARGUMENT

This case presents this Court the opportunity to determine if the State of Washington can validly tax a Colville Indian trader located on the Colville Indian Reservation whose business is financed through Federal and tribal economic development funds established to encourage Indian economic self-sufficiency, for the sole reason that the Colville Indian Tribe and its members have submitted to the criminal and civil jurisdiction of the State of Washington, authorized by Public Law 83-280, Ch. 505, 67 Stat. 588, 28 U.S.C. §1360 (hereinafter "Public Law 280").

The Washington Supreme Court interpreted Public Law 280 as granting states the power to impose on Indian tribes all state laws except those expressly excluded by its provisions. In this sweeping decision, the Washington Supreme Court repudiated other court opinions limiting the scope of Public Law 280 and ignored this Court's decision in *Warren Trading Post Company v. The Arizona State Tax Commission*, 380 U.S. 685 (1965) that Federal pre-emption of Indian commerce and of traders on Indian reservations prohibits the imposition of a gross proceeds tax on an Indian trader doing business on an Indian reservation.

Furthermore, the effect of the Washington Supreme Court decision is to threaten long standing economic self-sufficiency policies of the Federal government undertaken in furtherance of its special trust responsibilities for Indian

people. If the Washington Supreme Court opinion is not reversed, Federal pre-emption of Indian commerce, once exclusive and total, will wither and recede at the whim of Public Law 280 state revenue directors.

I

THE WASHINGTON SUPREME COURT IMPROPERLY CONSTRUED PUBLIC LAW 280 AS CONFERRING BROAD POWER ON THE STATE OF WASHINGTON TO TERMINATE THE FEDERAL REGULATION AND SUPERVISION OF INDIAN TRADERS

The Washington Supreme Court concluded that the State of Washington could impose any state tax on Indian enterprises so long as the [illegible] did not conflict with the exception clause, 28 U.S.C. § 1360(b), of Public Law 280. In reaching that conclusion, the Washington court improperly construed Public Law 280 as conferring on the states the power to terminate the absolute Federal pre-emption of Indian traders doing business on Indian reservations, as enunciated by this Court in *Warren Trading Post Co. v. The Arizona State Tax Commission, supra.* The Washington court attempted to distinguish Mr. Tonasket from the Indian trader in *Warren Trading Post, supra,* in order to sustain Washington state taxation, arguing that Mr. Tonasket did not have an Indian trader's license, that the Commissioner of Indian Affairs had failed to fully exercise the power to license Indian traders in the State of Washington, that Mr. Tonasket's business had a substantial number of non-Indian customers and that Mr. Tonasket's business was located on a reservation which had submitted itself to the jurisdiction of the state pursuant to Public Law 280.

There is nothing in Public Law 280 or in any other law which renders the Federal scheme for regulating Indian

traders inapplicable to Public Law 280 states.[1] If the Federal scheme is applicable to Indian traders doing business on Indian reservations in the State of Washington, the clear holding of *Warren Trading Post, supra,* is that the Federal government has pre-empted the field leaving no room for state taxation.[2]

Mr. Tonasket is an enrolled member of the Colville Confederated Tribe whose retail business is subject to the same comprehensive Federal regulation of Indian traders under 25 U.S.C. §§ 261 *et seq.* as was the enterprise in *Warren Trading Post, supra.* Because he is a full-blooded Indian, his business is exempt from the licensing requirements imposed on the enterprise in *Warren Trading Post, supra.*[3] Congress has exempted full-blooded traders from licensing regulations in furtherance of the Federal concern for the welfare of Indians and the historic Federal policy of non-interference by states in the lives of Indians. See e.g. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), *Williams v. Lee,* 358 U.S. 217 (1959). It would be odd, to say the least, for

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[1]In its *Warren Trading Post* opinion, this Court took cognizance of Public Law 280, 380 U.S. at 687, but gave no indication that the Federal scheme for regulating Indian traders did not extend to Public Law 280 states.

[2]In *Makah Indian Tribe v. Tax Commission,* 72 Wash. 2d 613, 434 P.2d 580 (1967), the Washington Supreme Court recognized that states are prohibited from taxing Indian trading on reservations and interfering with the Federal policy of control and protection, while holding that the Federal pre-emption rule of *Warren Trading Post, supra,* did not apply to non-Indian wholesalers conducting their business wholly outside of any Indian reservation.

[3]Title 25 U.S.C. § 264 provides:
Any person *other than an Indian of the full blood* who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500. . . . (emphasis supplied)

the State of Washington to jump into the breach and regulate full-blooded Indian traders leaving the Federal government to regulate only non-Indians. If the Commissioner of Indian Affairs has not fully exercised and enforced the Congressional mandate of regulating traders in the State of Washington, that fact, if it be true, cannot create a vacuum authorizing the assumption of state jurisdiction. *Cf. Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971). Congress has pre-empted the field. Neither the Commissioner of Indian Affairs nor any other administrative official can, by his action or inaction, permit a state to enter an area Congress has reserved exclusively for Federal regulation. See e.g. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926). Moreover, there is nothing in the Federal Indian trader statutes and regulations which would suggest that Federal regulation is not to encompass an Indian trader, operating on an Indian reservation, who has a substantial number of non-Indian customers or that the applicability of such Federal regulations is to be determined on a sales transaction by sales transaction basis. Indeed, implicit in the concept of Federal pre-emption is the notion that Congress and the appropriate federal agencies, and not the various states, have the power to determine the precise scope of Federal regulation.

In choosing not to follow the Federal pre-emption doctrine of *Warren Trading Post, supra,* and in permitting the taxation of an Indian trader in a Public Law 280 state, the Washington Supreme Court necessarily interpreted Public Law 280 as a termination statute, terminating, in effect, those Federal laws and policies relating to Indian traders which are applicable in non-Public Law 280 states. That Public Law 280 cannot be so interpreted is the clear holding of this Court in *Menominee Tribe v. United States*, 391 U.S. 404 (1968). In *Menominee Tribe, supra,* this Court

concluded that although the Menominee Termination Act of 1954, 68 Stat. 250, 25 U.S.C. §§ 891-902, rendered all statutes of the United States affecting Menominee Indians because of their status as Indians no longer applicable, the existence of Public Law 280 in the State of Wisconsin preserved certain Federally recognized rights intact.

Amicus contends that neither Public Law 280 nor any other Congressional enactment, in the absence of an explicit termination act, terminates the Federal pre-emption of the regulation and supervision of Indian businesses on Indian reservations. As amicus will demonstrate in Part II of this brief, the legislative history, existing judicial interpretation, and present Congressional and Executive policies all suggest that Public Law 280 should be construed as not terminating those special Federal policies and programs created to enhance Indian commerce.

II

THE CONGRESSIONAL CONFERRAL OF CRIMINAL AND CIVIL JURISDICTION PURSUANT TO PUBLIC LAW 280 SHOULD NOT BE CONSTRUED AS INCLUDING THE POWER TO TERMINATE PREVIOUSLY EXISTING FEDERAL INDIAN POLICIES

Before Congress adopted Public Law 280, the State of Washington and other states lacked the authority to extend the application of their general laws to Indian country.[4] By this Act, Congress extended to certain named states, not including Washington, jurisdiction over civil causes of action and criminal offenses occurring within Indian country in those states. With respect to the states—such as Washington —not specifically named in Public Law 280, §§ 6 and 7 of that Act provided procedures by which jurisdiction of

[4] *Worcester v. Georgia, supra. Williams v. Lee, supra.*

causes of action in Indian country could be assumed.[5] Washington acquired jurisdiction under Public Law 280 over the Colville Indian Reservation in 1965.

Although the conferral of jurisdiction was specifically limited by the exception clause of § 4 of Public Law 280, the grant of authority was vague and the full ramifications of extending civil jurisdiction over Indian reservations were apparently never fully explored. It was unclear as to what extent, if any, Public Law 280 was intended to obligate the states to substitute their laws for Federal regulation and supervision over Indian country. The exception clause of § 4 would, at the very least, suggest that Congress was concerned that Federal policies and programs regulating Indian trust property and Indian commerce incorporated in statutes and regulations, would remain in full force and effect in Public Law 280 states. Moreover, application of the legal maxim "expressio unis est exclusio alterius" would suggest that Federal laws regulating Indian commerce, such as the Federal Indian trader statutes, 25 U.S.C. § 261 *et seq.*, were not repealed by implication by the operation of Public Law 280 inasmuch as Section 2 of Public Law 280 explicitly repealed two similar Federal statutes, 18 U.S.C. 1152 (Assimilative Crimes Act) and 18 U.S.C. § 1161 (Ten Major Crimes Act) on those Indian reservations where states assumed jurisdiction.

When Public Law 280 was enacted, Congress was pre-occupied with Indian law enforcement problems. The legislative history of Public Law 280 confirms that it was designed primarily to assist certain Indian tribes in preserving law and order on their reservations. Senate Report No. 699, 83rd Cong., 1st Sess. (1953) states:

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[5]367 Stat. at 590.

> [C]onsequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility. (U.S. Code Cong. & Admin. News 2412 (1953))

There is no indication in the legislative history that Public Law 280 was intended to terminate existing Federal regulation and supervision of Indian country or to indiscriminately subject Indian reservations to hundreds of state laws, particularly those laws constituting a comprehensive scheme of state taxation. Indeed, the sweeping restriction of § 4 prohibiting the alienation or encumbrance of any real or personal trust or restricted property manifests a Congressional intent not to grant to the states significant taxing powers, for the enforcement scheme of most state taxes contemplates upon non-payment the levy and seizure of real and personal property. Such an enforcement action was undertaken by the State of Washington pursuant to RCW 82.32.310 in the present instance (see Jurisdictional Statement, p. 9).

Moreover, the absence of a Congressional plan to have Public Law 280 confer on the states the authority to terminate Federal regulation and supervision of Indian commerce, to substitute their own regulation and to impose comprehensive state taxation is demonstrated by the continuation of large scale Federal assistance programs for Public Law 280 reservations[6] and by the failure of Public Law 280

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[6]In fact, extensive Federal assistance and supervision still prevails on the Colville Indian reservation. For fiscal years ending 1970, 1971, and 1972, the Bureau of Indian Affairs and the Department of Health, Education & Welfare's Indian Health Services expenditures for the Colville Confederated Tribes equaled $2,119,697, $2,188,-

states to assume the burden of providing comprehensive state services to Indians consenting to state criminal and civil jurisdiction.[7]

Although Public Law 280 could be interpretated as authorizing an expansive conferral of legislative authority, this Court in *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971), *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1961), and *Menominee Tribe v. United States, supra*, has consistently construed Public Law 280 as a limited conferral of legislative power to the states, not designed to extinguish or interfere with Federal policies regarding Indians.

In *Kennerly v. District Court of Montana, supra*, this Court concluded that the State of Montana had improperly undertaken the assertion of civil and criminal jurisdiction pursuant to Public Law 280. This Court held that it was necessary to proceed cautiously and deliberately when permitting state action to impinge on the affairs of reservation Indians, observing:

664, and $2,928,636, while parallel appropriations for the Yakima Indian Tribe in Washington which is not a Public Law 280 reservation and which has an Indian population 2.5 times the Colville population, totaled $2,700,260, $3,194,630, and $3,621,333. [Information obtained from the Portland, Oregon offices of the Bureau of Indian Affairs and Indian Health Services.]

[7]Contrary to the statement of the Washington Supreme Court (Jurisdictional Statement, p. A-10), Indians residing in the Colville Indian Reservation are not enjoying all the rights and privileges which are enjoyed by Washington citizens generally. Through June 30, 1971, the Colville Confederated Tribes had paid approximately $40,000 per annum for certain government services, not including specific police protection, provided by Okanogan and Ferry Counties of Washington (ratified by Public Law 772, 70 Stat. 626) and had paid approximately $26,000 per annum for specific police services furnished by Okanogan and Ferry Counties of Washington (ratified by Colville Confederated Tribal Resolution of September 18, 1970).

> Our conclusion . . . is reinforced by the comprehensive and detailed Congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdiction of certain States to Indian country. (400 U.S. at 427)

Similarly, in *Metlakatla Indian Community v. Egan, supra,* this Court interpreted Public Law 280 and the exception clause thereunder as providing a broad and comprehensive *exception* to the imposition of state, civil, and criminal jurisdiction. This Court stated, "This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation . . ." (369 U.S. at 56) In *Menominee Tribe v. United States, supra,* this Court again construed Public Law 280, this time in *pari materia* with the Menominee Indian Termination Act of 1954. The Menominee Termination Act was by its terms to provide for the orderly termination of Federal supervision over tribal members and tribal property, but Public Law 280, although conferring civil and criminal jurisdiction on the State of Wisconsin, was nevertheless held to preserve for the Tribe all hunting, trapping or fishing rights previously granted.

Recent Congressional and Executive actions have clarified Public Law 280 as conferring limited legislative authority, not including the power to terminate Federal responsibility and supervision over Indian tribes. In 1968 Public Law 280 was amended to require tribal consent before a state can assert civil and criminal jurisdiction in Indian country, to allow assertion by a state of only a part of its civil and criminal jurisdiction and to allow states to retrocede jurisdiction previously acquired under Public Law

280.[8] The legislative history of these amendments indicates that they were initially proposed because Indian tribes had been critical of Public Law 280 because it authorized unilateral applications of state law without the consent of the tribes and without regard to special needs and circumstances of an individual tribe. Furthermore, in some tribes Public Law 280 resulted in an unnecessary pre-emption of tribal law with a resulting break-down in law and order.[9] The 1968 amendments evidence Congressional disillusion with the concept of allowing uncontrolled assertion of state jurisdiction over Indian country without regard to the best interest of Indians.

President Richard M. Nixon has taken a strong stand against previous Executive and Congressional policies favoring fundamental change in the special historical and legal relationship between the Federal government and Indian tribes.[10] Present Executive policies against termination of the special Federal Indian status and in favor of strong tribal self-government are based on solemn obligations entered into by the United States government in exchange for vast tracts of lands surrendered by Indians and on findings which show that the practical result of removing the Federal trusteeship has been to produce considerable disorientation among affected Indians in their dealings with a myriad of Federal, state and local governments.

The present Congressional and Executive policies favoring Indian self-government and the preservation of Federal responsibility are premised on the failure of recent termina-

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[8]Public Law 90-284, 82 Stat. 70 (codified as 25 U.S.C. § 1322 *et seq.* (Supp. 1969).

[9]Comments of Senator Sam Ervin, 1968 U.S. Code Cong. & Admin. News 1865, 1866.

[10]Message to Congress, July 8, 1970, 116 Cong. Rec. 23131 (1970).

tion policies. Accordingly, amicus contends that this Court should construe Public Law 280 as not conferring on the states the power to terminate Federal responsibility for the regulation of Indian traders. Moreover, amicus suggests that this Court has established a modern judicial trend limiting the assertion of state taxation of Indians, which parallels present Congressional and Executive policies designed to enhance Indian self-sufficiency. In *Squire v. Capoeman,* 351 U.S. 1 (1956) this Court established the proposition that when determining the taxability of Indians, it is necessary to determine initially whether Congress explicitly conferred the necessary taxing power and if so, whether the assertion of such taxing power interferes unjustifiably with any applicable Federal policy regarding Indian economic self-sufficiency. This Court stated:

> The courts below held that imposition of the tax here in question is inconsistent with the Government's promise to transfer the fee "free of all charge or encumbrance whatsoever." Although this statutory provision is not expressly couched in terms of nontaxability, this Court has said that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in treaties with the Indians should never be construed to their prejudice. . . .' " (351 U.S. at 6, 7)

This Court's decision in *Squire v. Capoeman, supra,* introduced a judicial rule requiring an affirmative showing of Congressional authorization to sustain taxability. Prior cases of this Court, in particular *Oklahoma Tax Commission v. United States,* 319 U.S. 598 (1942) and *West v.*

Oklahoma Tax Commission, 334 U.S. 717 (1947), required, in order for there to be immunity from taxation, an affirmative showing that the property was exempt by Congress from taxation. Recently, Judge Davis of the United States Court of Claims, in *Mason v. United States*, No. 417-70 (Court of Claims, decided June 16, 1972) summarized in a scholarly opinion recent developments in the area of Indian taxation and concluded that the old rule of *West v. Oklahoma Tax Commission, supra*, and *Oklahoma Tax Commission v. United States, supra*, requiring a finding of an explicit tax exemption, was no longer the appropriate test and adopted the alternative position first articulated in *Squire v. Capoeman, supra*, which measures the scope of proper taxability upon Indians by a determination of whether Congress, in the first instance, affirmatively authorized the particular tax intrusion into protected Federal Indian policies. Although *Squire v. Capoeman, supra*, involved Federal income taxes as distinguished from a state inheritance tax in *West*, or the cigarette excise tax in the present case, the rationale in *Squire v. Capoeman, supra*, of protecting the Federal policy of preserving restricted Indian assets from payment of taxes applies to death levies and excise taxes as well.

This Court's limiting interpretation of Public Law 280 is consistent with two United States Circuit Court opinions which turned directly on an interpretation of the scope of Public Law 280. In *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957), the court considered in a Public Law 280 jurisdiction whether a trust allotment of the Agua Caliente Band of Indians was exempt from a California inheritance tax and held the allotment not taxable because taxation would conflict with existing Federal exemptions provided the Agua Caliente Indians and with the exception clause of

Public Law 280 which the court stated "[m]erely negatives the idea that any change in the law as to alienation, encumbrance, or taxation of Indian property was intended." (243 F.2d at 865). In *United States v. Burland*, 441 F.2d 199 (9th Cir. 1971), the court considered whether Public Law 280 was intended to confer Montana State criminal jurisdiction over the people as well as the lands of the Salish and Kootenai Tribes. The court construed Public Law 280 narrowly, arguing that Public Law 280 was only part of a larger Federal legislative program relating to Indians and that other separate legislation was contemplated to affect specific disabilities and limitations applicable to Indians.

The Supreme Court of Washington also adopted this Court's limiting view of Public Law 280 in *Snohomish County v. Seattle Disposal Company*, 70 Wash.2d 668, 425 P.2d 22 (1967) and in *Sohol v. Clark*, 71 Wash.2d 664, 430 P.2d 548 (1967) and on second appeal, 78 Wash.2d 841, 479 P.2d 925 (1971) requiring in each case a showing of an *independent* Congressional authorization, apart from Public Law 280, in order to sustain Washington's legislative assertion against Indian country. For some inexplicable reason the Washington court in the instant case rejected this Court's restrictive interpretation of Public Law 280 as well as abandoning its own prior decisions in concluding that the authority contained in Public Law 280 was plenary and limited only by the exceptions expressed in the act.

CONCLUSION

For the above reasons, Amicus, Native American Rights Fund, urges this Court to reverse the decision rendered against the Appellant by the State of Washington Supreme Court. We urge this Court find that the Appellant, Leonard Tonasket, is a Federally regulated and sanctioned Indian

trader and therefore is protected from the taxes assessed against him by the State of Washington. Such a finding is consistent with the language and intent of Public Law 280 to confer on the states the authority to assert laws of general applicability without terminating existing Federal Indian policies.

Respectfully submitted,

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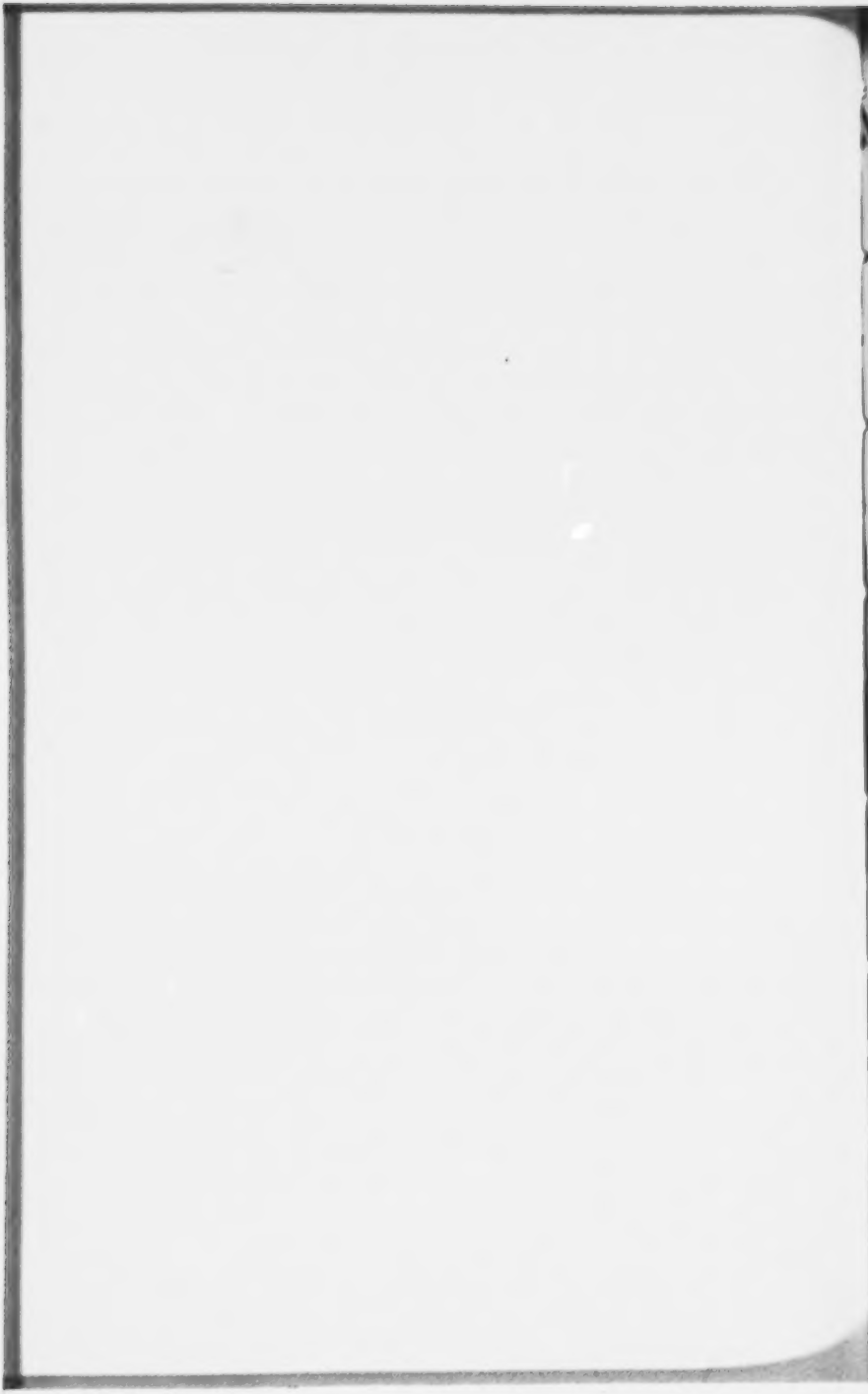

AUG 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

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THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,
Respondents.

AMICI CURIAE BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, WASHINGTON; SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION, WASHINGTON; MUCKLESHOOT INDIAN TRIBE OF THE MUCKLESHOOT INDIAN RESERVATION, WASHINGTON; SKOKOMISH INDIAN TRIBE OF THE SKOKOMISH INDIAN RESERVATION, WASHINGTON; CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, WASHINGTON; NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY INDIAN RESERVATION, WASHINGTON; AND SQUAXIN ISLAND TRIBE OF THE SQUAXIN ISLAND INDIAN RESERVATION, WASHINGTON

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INTEREST OF *AMICI CURIAE*

All of the *amici* are recognized Indian tribes whose reservation lands are located within the State of Washington. All of the tribes are subject to State civil and criminal jurisdiction by reason of Public Law 83-280. There are other Indian tribes in the State which are subject to partial State jurisdiction, whose interests may not be directly affected. But for those tribes which accepted State jurisdic-

tion, and that includes all of the *amici*, the ruling of the Washington State Supreme Court in this case presents a most serious invasion of their rights as Indian tribes under the treaties and laws of the United States.

In addition, *amicus* Colville Confederated Tribes have special interests: first, the appellant is a member of the *amicus* tribe and other members are engaged in similar enterprises; secondly, the *amicus* Colville Confederated Tribes have enacted a tobacco ordinance for the purpose of developing tax revenue from this source; and thirdly, the Colville Confederated Tribes have been paying substantial sums of money annually to Ferry and Okanogan Counties for county services as will be shown herein and have a special interest in refuting any claim of the State of Washington that it is under a financial burden by reason of having to extend services to Indian tribes by reason of Public Law 83-280.

In particular, *amici* are concerned that if the State Court decision here is allowed to stand only Indian land will be out of the reach of State taxing authorities. Indian fishing boats, fishing gear, hunting gear, logging gear, ranching and farm equipment, and inventories and supplies of merchandise in Indian-owned stores will all become subject to State taxes. In addition, the State will have the right to collect retail sales taxes on sales made to or by Indians on their own reservation lands. All of this will strike a harsh blow at Indians, because poverty is endemic on Washington State Indian reservations, as elsewhere, and the Washington State sales tax which applies to food, medicine and clothing hits poor people hardest.[1]

1. The State sales tax is contained in the Revised Code of Washington, Ch. 82.08.

Imposition of State excise taxes on Indian businessmen will have two inevitable results: prices of merchandise sold by these businessmen will be higher, directly affecting Indian purchasers, and Indian tribes will be deprived of any opportunity to impose their own taxes on businessmen operating within the reservation. Without the ability to tax, tribal government is seriously harmed and in many cases the harm will be crippling.

QUESTION PRESENTED

The ultimate question presented in this case is: Under Public Law 83-280, may the State of Washington validly impose all State taxes on Indians, Indian property and Indian commerce except direct taxation of property held in trusteeship by the United States?

STATEMENT OF THE CASE

The appellant here, Leonard Tonasket, a full-blood Colville Indian, was operating a store on the Colville Reservation when he was arrested and his merchandise seized by Washington State tax agents. He was charged with: (1) violating the registration requirements of the Washington State Tax Commission; (2) failing to have stamps on cigarettes in his possession;[2] (3) selling cigarettes without a State license;[3] and (4) selling cigarettes without a stamp affixed on every package.[4] The appellant was conducting his business on allotted lands held in trust for him by the United States within the boundaries of the Colville Indian Reservation (Single Appendix, p. 23, Findings of Fact). It also appears that Mr. Tonasket secured loans from the Bureau of Indian Affairs and from the Colville Tribes of

2. See RCW 82.24.050 and RCW 82.24.110.
3. See RCW 19.91.120 and RCW 19.91.170.
4. See RCW 82.24.050 and RCW 82.24.110; See also Single App. at 7.

federally-restricted trust funds in order to purchase inventory for his store, for which he gave a mortgage upon his trust allotment. And the store building in question here was actually built on his trust allotment with the proceeds of a $6,000 loan from the Colville Confederated Tribes.

Mr. Tonasket subsequently brought an action against the State of Washington seeking an injunction to end interference with his business (Single Appendix at 7).

SUMMARY OF ARGUMENT

I. The exceptions in Public Law 83-280 to the transfer of State jurisdiction rule out imposition of State excise taxes. This is because the exceptions prohibit State action which would have the effect of regulating the use of trust property. State law has precisely this effect. Also, State law would establish liens on Indian trust property and estates in violation of federal statutes. State laws would also be in contravention of the guaranties of federal treaties and Executive Orders, establishing reservations and preserving tribal government.

II. The exception clause merely preserves prior law regarding taxability and rights surrounding Indian property. Under the doctrines of federal preemption, tribal preemption, and federal instrumentality, the State is without authority to invade the area of taxation of Indian property otherwise immune from tax under those doctrines.

III. The exception clause in Public Law 83-280 could not authorize a permanent transfer of the entire authority of Congress over Indian commerce without contravening the Indian Commerce Clause of the United States Constitution and creating an unconstitutional delegation of legislative authority. Under familiar principles of statutory

interpretation, the clause must be construed to avoid such a conclusion.

IV. It is erroneous to assume that States had no duties and responsibilities respecting reservation Indians absent Public Law 83-280. Under the Fourteenth Amendment, States could not discriminate against Indians in extension of governmental services and benefits and Indians were constitutionally entitled to all such governmental services, except where State jurisdiction was barred by federal authority, tribal sovereignty, or other special Indian doctrines. The Colville Tribes actually paid cash to Okanogan and Ferry Counties for governmental services to which they were constitutionally entitled. Owning taxable land is not a prerequisite to receiving governmental services on an equal basis with other citizens.

V. The State of Washington did not validly assume jurisdiction under Public Law 83-280. Washington State's Constitution permanently disclaimed all claim of jurisdiction and control over Indian lands and the Congress specifically determined that this constitutional disclaimer would have to be repealed before Washington could assume jurisdiction. Its failure to do so, although sanctioned by its own court, violates congressional standards.

ARGUMENT

I. Public Law 83-280 Withholds Any Authority to Impose State Laws Which Would Have the Effect of Regulating the Use of Trust Property, or Imposing a Tax Directly on Trust Property, or a Tax on Any Other Property Which Could Result in a Lien Upon Trust Property

The facts are apparently not in dispute. The appellant was using his trust land to conduct a business.

In doing so, the appellant, Leonard Tonasket, was using his trust lands to gain a livelihood in the same way that any Indian who allows cattle to graze on his trust lands is using his lands to earn a livelihood. In fact, it should be noted that the entire effort of the federal government is to encourage more Indians to use their trust lands in ways similar to Mr. Tonasket's use in order to break the terrible cycle of poverty which afflicts Indian people everywhere.

If Washington State laws were applicable, then the effect is to regulate appellant's use of his trust land by reason of the licensing requirements which the State sought to impose on Mr. Tonasket.

RCW 19.91.120 provides:

> "After June 12, 1957, no person shall engage in, or conduct the business of purchasing, selling consigning, or distributing cigarettes in this state, without having first obtained the appropriate license for that purpose as prescribed in RCW 19.91.130."

RCW 19.91.170 provides:

> "Any person who shall engage in any business or activity for which a license is required under the provisions of this chapter, without first having obtained a license to do so, or who, having had such a license, shall continue to engage in or conduct such business after any such license shall have been revoked, or during suspension thereof, shall be guilty of a misdemeanor."

Actually, chapter 19.91 of the Revised Code of Washington, entitled "Unfair Cigarette Sales Act," gives the Washington State Tax Commission complete authority to set minimum prices for the sale of cigarettes and RCW 19.91.010 contains a number of definitions, including "cost to the wholesaler," "cost to the retailer," and "cost of doing

business by the retailer," which sets up minimum percentages which the Tax Commission will allocate to the basic cost of the cigarettes in order to arrive at the minimum legal price for cigarettes.

Clearly, Mr. Tonasket could not use his trust land to conduct a cigarette business without first procuring a license from the State of Washington. Then, having secured a cigarette license from the State of Washington, he could not conduct his business selling cigarettes at any price lower than that approved by the State Tax Commission. This is assuming that the State laws applicable to cigarettes are indeed applicable to Mr. Tonasket. It will be shown that this is contrary to the express prohibition in the exception clause in Public Law 83-280 which denies States the power of

> "[R]egulation of the use of such [trust] property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; . . ."

Further, application of State tax laws to the business being conducted by appellant on his trust land necessarily results, under Washington statutes, in exposure of such land to liens for nonpayment of taxes. RCW 82.32.210 and RCW 82.32.240. The latter statute provides that the State may file a claim in the probate of a deceased taxpayer for unpaid taxes and such claim shall be a lien upon the probate. Such a lien claim is in direct conflict with federal statutes and regulations thereunder. Indian probate proceedings are governed by 25 U.S.C §§ 372, 373, 373(a), 373(b), 374 and 377. The Secretary of the Interior has promulgated regulations governing the administration of estates of Indians which are found at 25 C.F.R. 15. Under

25 C.F.R. 15.25, priority of claims is set forth and provides that claims of general creditors are to be allowed after claims of indebtedness to the tribe and after claims of indebtedness to the United States or any of its agencies. Further, section 15.25(c) provides that no claims of general creditors shall be allowed if the value of the estate is $1,500 or less and the decedent is survived by a spouse or by one or more minor children.

It is seen, therefore, that if Washington law applies to Indians conducting a business on their trust property, and if that business involves the sale of cigarettes, then the Indian would be unable to use the property for that purpose without first procuring from the State of Washington the required license and, second, paying according to State law all taxes due thereon. Failure to pay subjects his trust lands to the claim of a lien, as well as his estate to the filing of a lien in probate proceedings.

The Washington State Supreme Court has construed personal property taxes to be inapplicable to Indian reservations and Indian lands where they would have the foregoing result. In *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968), the Washington State Supreme Court held that a motel business owned by an Indian and located on restricted lands on the reservation was not subject to a personal property tax because, said the court:

> "In event of failure to pay an ad valorem tax, the property is subject to foreclosure and sale. An Indian would thus lose his property in clear contravention of federal policy that he keep it, use it and develop it." at 685.

The court was, of course, applying the doctrine of *U.S.*

v. Rickert, 188 U.S. 432 (1903). To the same effect, *Sohol v. Clark*, 71 Wn.2d 664, 430 P.2d 458 (1967), and on second appeal, 78 Wn.2d 841, 479 P.2d 925 (1971). In *Makah, supra*, the Washington Supreme Court considered whether there was any significance to the fact that the Indian was using personal property acquired by work, savings, and borrowing, instead of by gift from the federal government, and was also using it for business rather than agricultural purposes. The court said at page 686:

> "[T]he tribal Indian here used the property in a profitable business of providing food, lodging and equipment for sport fishermen, hunters and tourists—*thus employing the personal property in adapting the land to one of the uses for which it was best suited.* As we understand federal policy, it is as much the government's desire to foster successful business enterprises on the reservation as it is to encourage farming, ranching and fishing." (Emphasis supplied.)

We submit that *Makah* stands for the proposition that, at least so far as the Washington Supreme Court is concerned, an Indian conducting a business on his trust land is "adapting the land to one of the *uses* for which it was best suited." (Emphasis supplied.) We think it is abundantly clear that State laws which require a State license before property may be put to a particular use is a *regulation of the use of such property.* Similarly, imposition of State taxes on sales made from such use of the property is also a regulation of the property, and State taxes which could result in liens on trust property all taken together are State laws unauthorized by Public Law 83-280.

The exception clause does contain the qualification reserved from the States that regulation of the use of such property be in a manner "inconsistent with any federal

treaty, agreement or statute or with any regulation made pursuant thereto."[5] It is clear that the Washington State laws referred to regulate the use of trust land and are violative of the following federal statutes, treaties and Executive orders. The Washington State law violates 25 U.S.C. § 261, the Federal Trader's Act, as applied and as construed by this court in *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

State regulation of the use of trust property in the form of taxation which could result in tax liens is violative of 25 U.S.C. § 354 which provides:

> "No lands acquired under the provisions of § 331-334 (Indian Allotment Act) of this title shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefore."

In this connection, it should be noted that income derived by Indians from their trust lands is not subject to federal income taxation because of the likelihood that such taxes could constitute a charge or encumbrance on trust property. *Squire v. Capoeman*, 351 U.S. 1 (1956); *Stevens*

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5. It is significant to note that the Washington State Legislature has amended its Indian legislation to make the exceptions to State jurisdiction even broader than those imposed by Public Law 83-280. The exception clause in 83-280 is codified in Washington State law at RCW 37.12.060. The exception section was amended by the Washington Legislature, Laws of 1963, Ch. 36, § 6, adding the phrase "and tidelands" after water rights and adding "Indian land grants" after "with respect to." Washington statutes contain nowhere any definition of the phrase "Indian land grants." The only meaning which can be reasonably attributed to this is allotments on Indian reservations. So read, Washington State law prohibits any State from action which would deprive any Indian of any right, privilege or immunity afforded under federal treaty, agreement, statute or executive order with respect to his allotment.

v. Commissioner of Internal Revenue, 452 F.2d 741 (9th Cir. 1971).

If the United States may not impose income taxes on income derived from trust lands because of the risk that such tax might prove to be a charge or encumbrance on the land (presumably, if not paid), then surely a State may not collect its excise taxes where such taxes would, (if not paid) under State law, constitute a lien on Indian real property, personal property, and even Indian estates.

Finally, State licensing and taxation of Indian businesses conducted within the bounds of reservations is "inconsistent with" federal treaties, Executive orders, and statutes which establish the reservation and recognize the tribe as a unit of government. This is because if State law is applied in the sweeping manner authorized by the decision of the Washington Supreme Court below, then the result is necessarily to deprive tribal government of one of its basic inherent powers: the power of taxation.

Tribal governments were authorized to organize pursuant to federal statute by the Wheeler-Howard Act (25 U.S.C. § 476 *et seq.*). Many tribes organized outside the Act and their constitutions were recognized by the Secretary of the Interior under 25 C.F.R. § 523. The Wheeler-Howard Act recognizes that entirely apart from the structure provided in federal statute, Indian tribes enjoy inherent powers. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (1956). It has been held that the power to levy taxes is an inherent attribute of tribal sovereignty, continuing until withdrawn or limited by treaty or act of Congress, *Iron Crow, supra.*

Furthermore, the basic treaties and Executive orders

which establish these reservations carry with them a federal intention that these reservation lands be dedicated to the economic sustenance of the Indian people destined to reside thereon. Here, the Colville Reservation was established by Executive Order of April 9, 1872, for the use of a number of bands of Indians. Other *amici* tribes occupy reservations set aside by treaties made with the United States in 1854 and 1855 (Treaty of Point Elliott, 1855, 12 Stat. 927; Treaty of Point No Point, 1855, 12 Stat. 933; Treaty of Medicine Creek, 1854, 10 Stat. 1132).

It has been well established that the basis for the reservation of land and rights under the treaties and Executive orders made during the 19th Century was that the Indians should be enabled to use their land for their own livelihood and support. *Winters v. U.S.*, 207 U.S. 564 (1907); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). State laws which license, tax and regulate Indians in the use of their reservation lands, and which impair tribal ability to govern is in contravention of statutes, Executive orders and treaties and is expressly prohibited by Public Law 83-280.

The exception clause of Public Law 83-280 must be construed broadly to preserve Indian commerce from State jurisdiction. A reading of Public Law 83-280 and its congressional history makes clear that Congress' primary objective was to extend the jurisdiction of courts and of police over Indians on their reservations. The exclusion contained in Public Law 83-280 reserving from the transfer to States any authority which would affect Indian trust property or treaty rights clearly looked toward the continuing existence of Indian tribes and reservations. Of par-

ticular significance was that part of Public Law 83-280 which provided:

> "(c) any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section."

II. The Exception Clause in Public Law 83-280 Preserves Prior Law Concerning Taxation of Indian Property

It is well established that statutes and laws are to be liberally construed to protect the rights of Indians with ambiguities resolved in the Indians' favor. *Winters v. United States, supra; Alaska Pacific Fisheries v. U.S., supra.* In fact, it has been held that the exception clause of Public Law 83-280 "merely negatives the idea that any change in the law as to alienation, encumbrance, or taxation of Indian property was intended." *Kirkwood v. Arenas,* 243 F.2d 863 (9th Cir. 1957).

If this is the proper effect to be given to the exception clause, then clearly State excise taxation of Indian commerce is wholly unauthorized. Implied grants of authority should not be favored, and in the absence of an express grant of authority for States to exercise tax power over Indian tribes, Indian reservations and Indian lands, such State power does not exist. Not only would such taxes invade an area federally preempted (*Warren Trading Post Co., supra*), it would also invade an area reserved for tribal government.

In fact, the Colville Tribe has since exercised its authority in this area by enacting a tribal tobacco ordinance im-

posing taxes on tobacco dealers operating on the reservation. (See Appendix A.) In *State of Arizona ex rel. Merrill v. Turtle,* 413 F.2d 683 (9th Cir. 1969), the United States Court of Appeals held that where the Navajo Tribe had legislated on the subject of extradition of Indian residents of the reservation, the claim of the State of Arizona to extradition jurisdiction over such residents interfered with rights essential to the Navajo's self government. Such claimed authority was denied by the Ninth Circuit. Similarly, here, the power to tax is an inherent power of tribal government. *Iron Crow, supra.*

Imposition of State excise taxes on merchandise in the hands of Indian businessmen under State law would totally displace and eliminate the tribes' power to tax. For the tribe to superimpose its taxes on merchandise already taxed by the State would be to increase the price of goods to its members and to make it more economic for such members to leave the reservation in order to trade with non-Indian businessmen. Obviously, this makes taxation of business activities on the reservation economically and politically impossible, but if State law is applicable in this field, then Washington State, by its statutes and its legal position, would prohibit tribal taxation. RCW 82.02.020 provides as follows:

> "The state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, conveyances, and cigarettes and no country, town, or other municipal subdivision shall have the right to impose taxes of that nature."

Furthermore, an official opinion of the Attorney General of the State of Washington, AGO 63-64 No. 68, has ruled that:

> "Insofar as the state has assumed jurisdiction pursuant to Section 1, Chapter 36, Laws of 1963 (over Indian tribes and reservations), the jurisdiction of the state is exclusive rather than concurrent."

The writer of the opinion concluded that the effect of Public Law 83-280 is to deprive the existing tribal organization of its authority and grant the State exclusive jurisdiction in all areas where State law applies. So that it is clear there is nothing left of tribal taxing authority in any area where State law has provided for taxation.

Such a result is clearly contrary to the express congressional intent in Public Law 83-280 that tribes would continue to function as units of government exercising governmental authority over their members and their reservations, and that the States would have no authority to enact any laws which could result in alienation or encumbrance of trust property or regulation of the use of trust property in any way inconsistent with established Indian rights.

III. If Public Law 83-280 Results in Irrevocable Transfer to States Assuming Jurisdiction Under It of the Entire Body of Authority Over "Indian Commerce," Then Public Law 83-280 Is an Unconstitutional Delegation of Legislative Authority

Article 1, Section 8, of the United States Constitution provides, in part:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

Regulation of foreign commerce, interstate commerce, and Indian commerce is vested in the national Congress. Congress cannot delegate or transfer its legislative power

to the States. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).[6]

Here Congress authorized the transfer of certain criminal and civil authority to the States. The Congress felt that once the cession became effective, the Federal Government had no further authority to act unless the States voluntarily retroceded the authority to the Federal Government. This is clearly the rationale behind the retrocession provisions contained in the 1968 Civil Rights Act, 15 U.S.C. § 1323. Obviously, if the Congress had felt it had retained a residual authority, the retrocession concept would not have been employed.

But the decision of the Washington State Supreme Court below gives Public Law 83-280 the effect of a wholesale, permanent and irrevocable transfer to the State of Washington of the entire power to regulate *Indian commerce* on those reservations where the State has taken full jurisdiction. To that extent, Congress has fully lost its constitutional authority over the subject. Such an interpretation would result in Public Law 83-280 contravening the Constitution.

It is elementary that where there are two possible interpretations of a statute, one of which would be unconstitutional and the other valid, a construction must be adopted which would uphold the constitutionality of the statute. *United States v. Harriss*, 347 U.S. 612 (1954); *United*

6. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1945), upholding State taxation of foreign insurance companies, is distinguishable. There is no legal principle barring State regulation of commerce and States do not regulate commerce, the questions lying principally in the area of the proper relationship between State and federal regulation. This is a far cry from the field of Indian affairs, where Congress traditionally has exercised plenary jurisdiction, both by reason of its constitutional mandate and the trust relationship with the Indian tribes.

States v. CIO, 335 U.S. 106 (1948); *Chippewa Indians v. United States*, 301 U.S. 358 (1937).

IV. The Burden-Benefit Argument: Time to Correct a Misleading Assumption

In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the Supreme Court made an assumption which was factually incorrect. The specific language is found at 380 U.S. 691:

> "And since federal legislation *has left the state with no duties or responsibilities respecting the reservation Indians*, we cannot believe that Congress intended to leave to the state the privilege of levying the tax." (Emphasis suppiled.)

This language was picked up and quoted by the Washington State Supreme Court in the decision below, *Tonasket*, 79 Wn.2d at 617. However, it was not true that federal legislation has left the State with no duties or responsibilities respecting the reservation Indians. The fact is that, at least in the State of Washington, prior to Public Law 83-280 the State owed to reservation Indians the same duties and responsibilities that it owed to all other citizens of the State except in the area of criminal law enforcement and involuntary civil court jurisdiction. For instance, All Indians were entitled to receive all forms of public assistance if they were otherwise eligible;[7] all Indians were entitled to receive medical treatment in State mental institutions; all Indians were entitled to resort to the civil courts in suits against non-Indians.

The list could be extended considerably. It should be

7. *King v. Smith*, 392 U.S. 309 (1968) holds that State eligibility requirements for public assistance programs receiving federal funds must conform to federal eligibility standards and may not exclude persons eligible under federal standards.

obvious that it would be a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution if a State were to deny a reservation Indian benefits which it extended to other citizens of the State.[8] So it is somewhat misleading to suggest that in the absence of the jurisdiction conferred by Public Law 83-280, the State had "no duties or responsibilities" whatever respecting reservation Indians.

This misconception was carried further by the Washington Supreme Court in the decision below. The court was apparently convinced that the principal reason for this Court's refusal to confirm Arizona's authority to tax traders on the Navajo Reservation was the fact that Arizona exercised no responsibility or duty toward the Indians. The Washington court then went on to reason that under Public Law 83-280 the State of Washington:

> ". . . does indeed have duties to perform for the Colville Indians. *These Indians now enjoy all the rights and privileges which are enjoyed by citizens generally.* They have the protection of all the states' criminal laws and services of its courts and all the benefits to which other citizens similarly situated are entitled under civil laws." 79 Wn.2d at 618. (Emphasis supplied.)

But the Washington court erred constitutionally if they grounded their decision on the premise that without Public Law 83-280 Indians were not legally entitled to general local governmental services.

The Washington State Supreme Court had acknowledged these services in the earlier case of *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968).

8. *Acosta v. San Diego County*, 126 Cal.App.2d 455, 272 P.2d 92 (1954).

The Makah Indian Tribe did not come under Public Law 83-280.[9] But the Washington court pointed out at page 679:

> "The state and Clallam County have made available to the Makahs many tax supported services, including public schools, aid through the Department of Public Assistance, hospitals and courts in case of mental illness on the reservation, and the state judicial system in matters of juvenile delinquency and dependency and adoption."

The Court stated at page 686:

> "Of course, Indians who live here are citizens of the state and of the United States with all the rights, privileges and immunities citizenship carries."

A reading of the opinion in that case makes it clear that the Washington Supreme Court was distinctly unhappy that they were required to affirm that the personal property tax could not validly reach the property of a Makah Indian. No doubt the sentiments of the Washington State Supreme Court are shared by many other officers of state government. But one thing should be clear: it was not Public Law 83-280 which imposed upon States assuming jurisdiction over Indians the burden of providing equal governmental treatment to Indians; it was the Fourteenth Amendment to the Constitution of the United States. Public Law 83-280 extended those services only in areas previously excluded by tribal sovereignty and federal jurisdiction: civil and criminal court jurisdiction and law and order functions.

The frustration of non-Indian governmental units at not being able to tax Indian lands is particularly well-illustrated in the case of the Colville Tribes. After years of struggling to establish clear title to their Reservation

9. *See Tonasket v. State*, 79 Wn.2d at 615, n.2.

by congressional enactment, the Colville Tribes found that they stood no chance of getting such a bill passed by Congress without the support of the local counties who, in turn, insisted that the Tribes would have to agree to pay each of the counties a fixed sum of money for governmental services. (See Appendices B, C and D.)

As shown by the correspondence in Appendices B, C and D, the Colville Tribes were clearly made to understand that if they wanted title to their lands restored to them by act of Congress they would have to agree to a contract to pay the two counties for governmental services. The contract was entered into (Appendix E) and subsequently Congress passed Public Law 84-772 (70 Stat. 726) which restored the Colville Tribes' lands to them but also ratified and approved the contract with the counties. Commencing in January of 1957 and continuing until 1971, the Colville Tribes dutifully paid to Okanogan and Ferry Counties $20,000 each per annum.[10] In addition to the $40,000 annually paid to the counties for general governmental services, the Tribes voluntarily paid additional sums totalling $137,571 from 1965 through 1970. (See Appendix F.)

It should be stated that the arrangement by which an agreement to pay for governmental servics was extracted from the Colville Tribes as the price of return of their lands by a unique "contract" between the Tribes and the counties, did not exist in the case of any of the other *amici* tribes. Nevertheless, it illustrates that the local counties have received very substantial money benefits from the Colvilles as the price of extending to them the ordinary services of government. It hardly needs mention that own-

10. In 1971, upon advice of counsel, the Tribes suspended further payments to the counties.

ing taxable real estate is not a constitutional requirement for entitlement to the benefits of government. Millions of Americans below the poverty level living in our cities have no taxable real estate and derive greater benefits from local government than many American Indians.

V. The State of Washington Has Never Validly Assumed Jurisdiction Over Indians on Reservations Within the State Under Public Law 83-280

A. *The Method of Assumption of Civil and Criminal Jurisdiction Over Indians and Indian Reservations by the State of Washington Violates the Enabling Act Admitting It Into the Union.*

In Section 4 of the enabling act for the State of Washington, 25 Stat. 676, Congress provided prerequisite to admission of Washington into the Union that the organizational convention provide

> "[B]y ordinances irrevocable without the consent of the United States, and the *people* of said States. . . ." (Emphasis supplied.)

a disclaimer of all jurisdiction over Indians and Indian reservations.

In compliance with this requirement of the enabling act, the organizational convention provided in Article XXVI of the Washington State Constitution as follows:

> "The following ordinance shall be irrevocable without the consent of the United States and the *people* of this state:" (Emphasis supplied.)
>
> ". . .
>
> "Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian

> or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ." (Emphasis supplied.)

In 1953 in Public Law 83-280 (67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360) Congress made provision for outright assumption by five named states of total civil and criminal jurisdiction over Indians on reservations therein. Recognizing that other states, including Washington, had enabling act and state constitutional impediments to assumption of such jurisdiction, Congress provided in Section 6 of Public Law 83-280 as follows:

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State *to amend, where necessary, their State constitution* or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That *the provisions of this Act shall not become effective* with respect to such assumption of jurisdiction by any such State *until the people thereof have appropriately amended their State constitution* or statutes as the case may be." (Emphasis supplied.)

Thus the United States gave its consent to the "people" of Washington to revoke *by amendment* the ordinance contained in Article XXVI of the Washington Constitution.

Despite the clear language of the enabling act, the Washington Constitution and Public Law 83-280, and *without amending the Washington Constitution,* the Washington Legislature enacted Chapter 240, Laws of 1957 (amended by Chapter 36, Laws of 1963 and now

codified as RCW 37.12.010, *et seq.*) which provided for state assumption of civil and criminal jurisdiction over Indians and Indian reservations.

That Congress intended to provide a method of revocation of the ordinance in the enabling act exclusively by vote of the people is demonstrated not only by the plain meaning of the language of the act, but perhaps most forcefully by the consistency of Congress' use of language.

In Section 4 of the enabling act, Congress makes the ordinance irrevocable without the consent of "the United States" and "the people" of the various states. By consent of "the United States" Congress obviously meant consent of the United States as articulated by the Congress; by consent of "the people" of the various states, Congress obviously meant consent by vote of the people. Had Congress intended instead, in the case of the States, consent articulated by the legislatures of the States, Section 4 could reasonably have been expected to be phrased "by ordinances irrevocable without the consent of the United States *and the said states.*"

B. *The Method of Assumption of Civil and Criminal Jurisdiction Over Indians and Indian Reservations by the State of Washington Violates Public Law 83-280.*

In Public Law 83-280, Congress prescribed state constitutional amendment as the method of Washington's assumption of civil and criminal jurisdiction over Indians and Indian tribes. This conclusion is not only borne out by an analysis of the specific language of Public Law 83-280 applicable to the State of Washington, but is necessary to give meaning to the several sections of Public Law 83-280

which were carefully tailored to fit the legal situations in the different states.

Sections 1 through 5 of Public Law 83-280 conferred civil and criminal jurisdiction over Indian lands upon the five named states of California, Minnesota, Nebraska, Oregon and Wisconsin. Cognizant of enabling act and constitutional impediments of eight other states to assumption of jurisdiction, Congress added Section 6 which reads:

> "Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given *to the people of any State* to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." (Emphasis supplied.)

Finally, Congress added Section 7 to allow assumption of jurisdiction by the remaining 37 states. That section provides:

> "Sec. 7. The consent of the United States is hereby given *to any other* State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (Emphasis supplied.)

Returning to Section 6, one finds that Congress' consent to the amendment of State constitutions,

> ". . . where necessary, . . . to remove any legal impediment to the assumption of civil and criminal

> jurisdiction in accordance with the provisions of this Act"

evidences Congress' recognition that the constitutional impediments of Arizona, Montana, New Mexico, Oklahoma, Utah and Washington can *only* be removed by constitutional amendment whereas the legal impediments of North and South Dakota can be removed by simple legislative enactment.

Analysis of the constitutions of those six states confirms that the disclaimers of jurisdiction can only be revoked through the amendment procedures established therein. In contrast, Article XXII of the Constitution of South Dakota provides for revocation of the jurisdictional disclaimer by "the consent of the United States and the people of the State of South Dakota expressed by their legislative assembly." Similarly, Article XXVI of the Constitution of North Dakota provides for revocation of the jurisdictional disclaimer through legislative enactment. The people of South Dakota and North Dakota, then, *in adopting their constitutions*, specifically delegated to their legislatures the authority to exercise their consent to assumption of jurisdiction over Indians and Indian tribes. The people of the State of Washington have not.

A reading of the Senate and House Committee Reports on H.R. 1063 (1953 U.S. Code Cong. & Ad. News p. 2412; 99 Cong. Rec. 10782, August 1, 1953) dispels any doubt as to which states are referred to in Section 6 of Public Law 280:

> "Your committee has amended the printed bill by adopting substitute language which operates to—
>
> " . . .
>
> "(1) give consent of the United States to those

States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment *by amending or repealing such disclaimer laws.*

"Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; *such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.*" (Emphasis supplied.)

Congress was not content merely to state its consent in Section 6; instead, Congress added the proviso which *conditions* state assumption of jurisdiction as follows:

"*Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until *the people* thereof have appropriately amended their State constitution or statutes as the case may be." (Emphasis supplied.)

If Washington could assume jurisdiction by simple legislative enactment which abrogates the mandatory provisions for amending the state constitution, it follows that each of the other eight states for which Section 6 of Public Law 83-280 was framed could do so as well and thus frustrate Congress' clearly expressed intention that Sections 6 and 7 apply to two separate groups of states. Further, if the first half of the disjunctive proviso to Section 6 (". . . constitution or statutes . . .") has any meaning at all, it must mean that those states (excluding South Dakota and

North Dakota) cannot assume jurisdiction without constitutional amendment. Congress made clear the terms of its consent to state assumption of jurisdiction in Section 6 and then underlined it in the proviso.

Thus Congress twice spelled out the method of Washington's assumption of the jurisdiction which Congress relinquished—once in the enabling act and again in Public Law 83-280. It is clear that Congress had the absolute and undisputed right to do so. That the assumption of jurisdiction by the Washington Legislature without amending the Constitution violates the mandatory provisions of Public Law 83-280 and is invalid is equally clear.

The Washington State Supreme Court ruled in *State v. Paul*, 53 Wn.2d 789 (1959), that consent of the people as used in Article XXVI is equivalent to "consent of the people as expressed by the Legislature." The Court reaffirmed that decision in *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 16.[11]

However, the 9th Circuit ruled in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (1966), *cert. denied*, 387 U.S. 907, that Washington State could validly assume jurisdiction without amending its constitution. It is respectfully submitted that the question is not solely a question of State law to be decided by the highest court of this State, but rather a question of whether a State has complied with the prior conditions laid down by the Congress.

11. The Jurisdictional Statement in that case presented to the Supreme Court only questions relating to status of roads on the Makah Reservation and did not present to the Supreme Court the question of the propriety of the State's assumption of jurisdiction. See Jurisdictional Statement in Cause 922, October Term, 1969.

But the recent decision of the U.S. Supreme Court in *Kennerly v. District Court of Ninth Judicial District of Montana,* 400 U.S. 423 (1971), suggests that the 9th Circuit erred in the *Quinault* case. In *Kennerly* the court refused to uphold the Supreme Court of Montana which ruled that Montana had validly taken jurisdiction over the Blackfeet Reservation. The court held that *strict compliance* with the Congressional Enabling Act which is 83-280 would be required. The court found that there had not been such compliance in this case. There is an interesting parallel to the present case: in *Kennerly* the court refused to rule that legislative action by the tribal council was tantamount to "tribal consent" as stated in the 1968 Civil Rights Act amendments, but rather than such tribal consent had to be approved by majority vote of the enrolled Indians within the area as provided by statute. The Washington court and the 9th Circuit have ruled that the state legislature may override the state's constitution despite the strict requirements laid down by Congress in Public Law 83-280.

CONCLUSION

Each of the *amici* tribes is subject to total state jurisdiction under Public Law 83-280 by virtue of having asked for such jurisdiction under the provisions of Washington law, RCW 37.12.020 (since repealed), and RCW 37. 12.021. Every one of the tribes was under the clear impression that in petitioning for state jurisdiction, they were merely asking to receive better policing on their reservations than they previously had. In many cases, there had been no law enforcement whatever. Naively hoping that asking for state "law and order" would improve their reser-

vation conditions, these tribes sent in their resolutions to the Governor asking for state jurisdiction. No one dreamed that the state would use this law as a means of stripping away from Indians long established Indian rights to their lands and property. This is what the state taxing authorities of the State of Washington have attempted and their action has received the sanction of the Washington State Supreme Court. It is respectfully submitted that such a construction is contrary to the express language of the Congressional Act. Public Law 83-280 must not be construed as an implied grant of taxing authority to the states, but rather as retaining those tax immunities to Indians which are necessary to the advantageous use of their reservation trust lands.

Respectfully submitted,

ZIONTZ, PIRTLE & MORISSET
3101 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 623-1255

ALVIN J. ZIONTZ
Counsel for Amici Curiae

APPENDIX A

RESOLUTION 1972-375

Colville Tobacco Ordinance as Amended

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Reservation, and

WHEREAS, under the Constitution and Bylaws of the Tribes the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, by virtue of their status as Indian tribes, the Colville Confederated Tribes are authorized by federal law to possess unstamped cigarettes and other tobacco products on the Colville Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Colville Business Council deems it essential to the health, security and general welfare of the Colville Confederated Tribes to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Colville Indian Reservation,

NOW, THEREFORE, the Colville Buiness Council does hereby promulgate and enact the following ordinance:

AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products
within the Colville Indian Reservation

Section 1. Title.

This ordinance shall be known as the Colville Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(1) "Tribes" shall mean the Confederated Tribes of the Colville Indian Reservation.

(2) "Council" shall mean the Colville Business Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(6) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribes together with all freight charges and other expenses incurred by the Tribes in their receipt and distribution.

(7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

(8) "Operator" shall mean an enrolled member of the Colville Confederated Tribes licensed by the Tribes to manage a tobacco outlet.

Section 3. Establishment of Tobacco Outlets.

The Council shall establish one or more tobacco outlets within the Colville Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

Section 4. Nature of Outlet.

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribes by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

Section 5. Application for Tobacco Outlet License.

Any enrolled member of the Colville Confederated Tribes may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

Section 6. Tobacco Outlet License.

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a one-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Colville Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

Section 7. Traders License.

No tobacco outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's License from the Superintendent of the Colville Indian Agency. Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

Section 8. Excise Tax Imposed.

There is levied and there shall be collected as hereinafter provided, a tax upon the distribution of all cigarettes sold or distributed hereunder in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges. The excise tax levied hereunder shall be added to the retail selling price of tobacco products sold to the ultimate consumer.

Section 9. Purchase by Tribes.

All tobacco products purchased by the Tribes pursuant hereto shall be purchased with federally-restricted tribal funds.

Section 10. Wholesale Distribution.

Wholesale distribution of tobacco products by the Tribes to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

Section 11. Tobacco Products Federally Restricted Tribal Property.

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property owned and possesed by the Tribes until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price as provided in Section 10 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

Section 12. Remuneration to Operator.

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

Section 13. Restricted Sales to Non-Indians.

An operator may not sell more than two cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

Section 14. Restricted Sales to Minors.

An operator may not sell any tobacco products to any person under the age of 18 years.

Section 15. Other Business by Operator.

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribes. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

Section 16. Tribal Immunity—Liability—Credit.

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribes from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribes or to utilize tribal credit.

Section 17. Operating Without License.

No person shall operate a tobacco outlet on the Colville Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

Section 18. Purchases.

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribes.

Section 19. Liability Insurance.

An operator shall maintain liability insurance upon his premises in the sum of not less than $25,000.00.

Section 20. Revocation of Tobacco Outlet License.

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the penalties provided in Section 21 below.

Section 21. Violation—Penalties.

Any person violating the provisions of this ordinance shall be guilty of an offense and subject to a fine in Tribal Court of not less than $50.00 nor more than $250.00 and forfeiture of all of the Tribes' remaining stock of tobacco products distributed hereunder and situate in his tobacco outlet. The tribal law enforcement officers shall be empowered to seize forfeited tobacco products.

Section 22. Separability.

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

THE FOREGOING was duly enacted by the Colville Business Council meeting in special session this 23rd day of June, 1972, at the Colville Indian Subagency, Nespelem, Washington, by a vote of 10 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:
/s/ MEL TONASKET
Colville Business Council

A-7

RESOLUTION NO. 1972-376

Amendment No. 1 to Colville Tobacco Ordinance

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Reservation, and

WHEREAS, under the Constitution and Bylaws of the Tribes the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, on March 10, 1972, the Colville Business Council enacted Resolution 1972-125, the Colville Tobacco Ordinance, and

WHEREAS, a legal question has arisen whether the Colville Business Council should license tribal tobacco outlets on non-trust land within the Colville Indian Reservation, and

WHEREAS, general counsel for the Colville Confederated Tribes have advised the Colville Business Council that as a matter of federal Indian law, licensed tribal tobacco outlets must be situate on trust land within the Colville Indian Reservation,

NOW, THEREFORE, BE IT HEREBY RESOLVED that we, the Colville Business Council, meeting in special session at the Colville Indian Subagency, Nespelem, Washington, acting for and on behalf of the Colville Confederated Tribes this 23rd day of June, 1972, do hereby amend Resolution 1972-125 by making Section 2 (7) read as follows:

> (7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

BE IT FURTHER RESOLVED that the Colville Tobacco Ordinance be re-enacted as Resolution 1972-375 with the following changes:

1. After the words "Colville Tobacco Ordinance" shall be added the words "as amended."

2. Section 2 (7) shall read: "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land in the Colville Indian Reservation.

3. The concluding paragraph showing the date of enactment and the vote shall be changed to read "23rd day of June, 1972," and "10 FOR and 0 AGAINST," respectively.

COLVILLE BUSINESS COUNCIL

/s/ MEL TONASKET
By: Mel Tonasket, Chairman

THE FOREGOING was duly enacted by the Colville Business Council by a vote of 11 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:
/s/
Secretary, Colville Business Council

APPENDIX B

UNITED STATES Counsel
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Portland Area Office
Portland 18, Oregon

March 26, 1954

Mr. Lyle Keith
Attorney at Law
Spokane & Eastern Building
Spokane 4, Washington

Dear Mr. Keith:

This is in reply to your letter of March 24th relative to the proposed agreement between the Colville Business Council and the Boards of County Commissioners of Ferry and Okanogan Counties, Washington, under the provisions of which the counties would jointly receive $40,000.00 a year for a period of three years.

Our grave doubts concerning the legality of the proposed agreement was never meant to imply that this office was or now is opposed to the purpose of the proposed agreement, but only whether the proposed agreement was accomplishing the desired purpose in a proper manner. When the proposed agreement reached this office it was noted that no consideration was stated therein for the payment of the $40,000 per annum. At the same time this office received a communication from Louis Wapato of Manson, Washington, wherein he raised purported legal objections to the proposed agreement, a copy of which letter was sent to you.

It was fully realized that you, as Tribal attorney, would review the agreement for legality and form before its final submission for departmental approval and undoubtedly correct any "bugs", if any, in the form and manner in which

the agreement was being presented, and thus overcome any objections that had or might arise as to the legality of the means taken to accomplish the desired purpose.

For your information, Tribal Business Council Resolution 1954-9 of January 21, 1954 approving the action of the negotiating Committee and accepting the principle of paying the $40,000.00 annually to the counties as a contribution toward county government, together with all correspondence to March 17, 1954, was, on March 17th, sent to the Commissioner of Indian Affairs for his consideration and decision relative to approval of the Resolution upon which the proposed agreement depends.

It is suggested that when a redraft of the proposed agreement is made, as mentioned in your letter, that consideration be given to expressing in the agreement the fact that the consideration therefor is the extension by the counties of county services to the Indians of the Colville Reservation in like manner as those services are now rendered to non-Indians elsewhere within the state.

Sincerely your,
/s/ L. P. Towle
Acting Area Director

APPENDIX C

Colville Indian Agency
Nespelem, Washington
April 21, 1954

Mr. Don C. Foster
Area Director
Bldg. 1, Swan Island
Portland 18, Oregon

Dear Mr. Foster:

We are enclosing, in quintuple, copies of an agreement entered into on the 21st day of April by and between the Confederated Tribes of the Colville Reservation and the Counties of Ferry and Okanogan of the State of Washington. I have approved this agreement and urgently recommend that it be forwarded for the approval of the Commissioner and the Secretary at the earliest possible date.

This agreement culminates a series of meetings and conferences between this office, the Confederated Tribes and the boards of County Commissioners of Ferry and Okanogan Counties which have been carried on during the past two years and which were further stimulated by a meeting held in Okanogan, Washington this past fall at which both Congressman Walt Horan and Senator Warren Magnuson were present. Both Senator Magnuson and Congressman Horan at that meeting assured the members of the tribe and the County Commissioners that if agreement could be reached between the Confederated Tribes and the Counties they would do everything they could to further the so-called Colville land restoration bill in the Congress.

The first suggestion officially made that this form of agreement might be entered into between the Tribes and the Counties was contained in a letter signed by Commissioner Myer addressed to the Area Director of the Portland

Area Office under date of April 23, 1952. The suggestion is contained in paragraph 4, page 1, of this letter.

We feel that through the execution of this agreement, the tribes' efforts toward clearing of the title to the 818,000 acres of so-called tribal lands has been greatly furthered. It is absolutely essential, if this tribe is to continue as a tribal entity, that the Colville land restoration bill be approved. Your help in furthering this matter to the greatest extent possible will be greatly appreciated.

Sincerely yours,

Floyd H. Phillips
Superintendent

CC - Tribal Council
CC - Lyle Keith
Encls.

APPENDIX D

Colville Indian Agency
Nespelem, Washington
June 8, 1954

Mr. Don C. Foster
Area Director
1001 N.E. Lloyd Boulevard
Portland 14, Oregon

Dear Mr. Foster:

Under date of May 18 we wrote you concerning various matters which we felt might be of interest to you while you were at the recent conference in Washington, and included in the material mentioned in this letter was a reference to our letter of April 21, 1954, with which we enclosed copies of an agreement which had just been entered into by and between the Confederated Tribes of the Colville Reservation and the Counties of Ferry and Okanogan. This agreement provided for payments to these counties of certain sums of money if and when the title to 818,000 acres of so-called tribal lands was restored to the tribes. There appears to be some question now, since the advent of the so-called Horan termination-restoration bill, as to whether or not this proposed agreement should be approved by the Bureau and the Department. I still feel that it should receive such approval and still feel that we should do all we could to have the agreement approved.

It might be well to give you a little of the background in connection with this matter for I know that you have not had time to study the voluminous files in connection with this so-called restoration.

In an agreement entered into by the Colville Indians under date of November 1, 1905, all right, title and interest in the lands within the so-called south half of the reservation was relinquished to the United States except those

lands which were to be allotted to each Indian having tribal rights on the reservation. These allotments were authorized by the Act of March 20, 1906 and were subsequently made. This Act also provided for the sale of the surplus or unallotted lands of the diminished Colville Reservation. Allotments were completed during the year 1914 and the allotment rolls were closed. By Presidential proclamation of May 3, 1916 the unallotted unreserved lands within the diminished reservation classified as irrigable lands, grazing lands or arid lands were opened to settlement. Some of the timber lands and mineral lands were not subject to homestead entry.

At the time of the passage of the Indian Reorganization Act, which carried a provision that for those tribes which accepted the Act lands which had been ceded by them to the government and which had not been entered upon would be restored to tribal ownership, the Colville Indians did not accept the Reorganization Act and consequently such automatic restoration could not be accomplished. The Department, however, in order to prevent further entry of these lands, by Department Orders of September 19, 1934 and November 5, 1935, temporarily withdrew from all further entry, either homestead or mineral, the lands which still remained open. These lands consisted of approximately 818,000 acres and are the so-called tribal lands of the Colville Indians from which they presently derive practically all of their tribal income largely from the sale of timber and grazing privileges.

The land remains in this status at present, merely being held from further entry through the Department Orders mentioned above. It was not until about 1947 or 1948 that any active campaign was entered into to try to get these lands restored to tribal ownership. At that time a continuing series of conferences was held between Indian Service officials, tribal representatives and the county commissioners of the counties involved which endeavored to reach

mutual agreements through which legislation could be introduced which would clarify the land status. The first agreements hinged both upon so-called restoration bills and in-lieu-of-tax bills, the in-lieu-of-tax bills providing for certain payments to the counties from the Federal treasury to make up for their lack of revenue from the non-taxable tribal lands. The restoration bill was introduced in both the 80th and 81st Congress and was passed in the House at both sessions. It did not, however, receive favorable action in the Senate and thus was killed in both sessions. The in-lieu-of-tax bills were never given favorable consideration by either of the houses of Congress.

In a letter of June 13, 1951 to the Area Director of the Portland Area Office signed by H. Rex Lee, Acting Commissioner, the opinion was expressed that the in-lieu-of-tax bills should not be given further serious consideration. The Office, in this letter, made a suggestion that the financial plight of Ferry, Stevens and Okanogan Counties should be discussed with the tribes, by the Area Director, with the view that the tribes might be able and willing "to make some contribution toward the services which they are now obtaining from these counties." This suggestion was given very serious consideration by both the Area Office and the agency office and discussions were held with the tribe and the county commissioners along the lines suggested.

In the fall of 1953 at a meeting held at the county seat of Okanogan County, at which the tribal delegates and the county commissioners of both Ferry and Okanogan Counties were present, Congressman Walt Horan told the assembled delegates in the presence of Senator Magnuson that he felt before any further action should be taken toward re-introduction of a restoration bill that a mutually satisfactory agreement should be worked out between the Colville Tribes and the counties involved. Congressman Horan left the impression at this meeting that he would not be in favor of re-introducing legislation until such an

agreement was reached here in the field. Subsequent to that meeting a series of meetings were held—some occurring here at the agency, some at the county seat of Okanogan County, and some at the county seat of Ferry County—between tribal representatives and the county commissioners and officials of the Indian Service. As a result of this series of meetings and conferences, agreement was finally reached which culminated in the agreement as transmitted to you for approval with our letter of April 21, 1954. With our letter of transmittal we urged that this agreement be approved.

Since forwarding the agreement on April 21, we have on several occasions talked with various members of the boards of county commissioners and we have also talked with them subsequent to the submittal by Congressman Horan of his proposed termination-restoration bill. All of the county commissioners with whom we have talked feel that the agreement as executed by the Confederated Tribes and the counties should be approved by the Department even though it may, because of the proposed termination-restoration bill, be of no force and effect. The reasoning behind this is that it would greatly hearten the counties involved to know that the Bureau and the Department were behind their request for contributions toward county government and that the Bureau and Department recognized the need of the counties for additional funds. They seem to feel that if the Department now refuses to sign this agreement that all of the work that has been done subsequent to the Office letter of June 13, 1951 would have been for naught and that the Bureau would not have been sincere in their suggestion made at that time. They feel, too, that there still may be a chance for reintroduction of the restoration bill and its passage prior to the passage of any termination legislation. Some of the county commissioners have voiced their opinion that if this agreement does not receive approval that they would be

extremely reluctant to try to do any further business with the tribes or to reach any agreements whatsoever with them.

I feel from a public relations angle that it is highly desirable to have this agreement approved. I realize, of course, that Congressman Horan's proposed termination-restoration bill throws an entirely different light on the whole subject, but nevertheless that is *proposed* and the agreement, insofar as the tribes and the counties are concerned, has been reached and is an actuality. I feel sure that the relationships between the Confederated Tribes and the counties will remain on a much better footing if the agreement were to be approved. I again urge, as I have in previous correspondence, that the agreement receive such approval at the earliest possible time.

Sincerely yours,

Floyd H. Phillips
Superintendent

APPENDIX E

AGREEMENT

THIS AGREEMENT, made and entered into this 21st day of April, 1954, by and between THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, hereinafter referred to as the Tribe, and FERRY COUNTY, a municipal corporation organized and existing under the laws of the State of Washington, and OKANOGAN COUNTY, a municipal corporation organized and existing under the laws of the State of Washington, hereinafter collectively referred to as the Counties;

WITNESSETH:

WHEREAS, the Reservation of the Tribe is located within the boundaries of the Counties within the State of Washington; and

WHEREAS, the tribally owned and tribally held lands, together with the lands allotted to individual members of the Tribe, constitute a sizeable proportion of the total lands lying within the boundaries of said Counties; and

WHEREAS, the Tribe is desirous of contributing financial aid and assistance to said Counties for the performance of their governmental functions and duties, both within and without the Reservation of the Tribe; and

WHEREAS, some of the services which have heretofore been performed by said Counties and which will continue to be performed by said Counties are of aid, both direct and indirect, to the Tribe and its enrolled members;

NOW, THEREFORE, for and in consideration of the recitals hereinabove made, the covenants hereinafter contained and other good and valuable consideration, the receipt of which by both the Tribe and the Counties is hereby acknowledged, the Tribe and the Counties hereby agree as follows:

1. Subject to the conditions hereinafter set forth, the Tribe agrees to pay to the Current Expense Funds and Road Funds of the Counties the sum of Forty Thousand Dollars ($40,000.00) per year for three (3) years, the division of said sum between Okanogan County and Ferry County to be agreed upon by the Counties. A written agreement determining the proportion of said $40,000.00 to be paid to each of said Counties shall be executed by the Board of County Commissioners of each county and delivered to the Tribe prior to the making of such annual payments.

2. The Counties covenant to render those services and perform those functions of government for the Tribe and its enrolled members, both within and without the Reservation, as are now being rendered or performed, or which may be directed by future statutes. In addition, the Counties do covenant to render and perform for the benefit of the Tribe and its enrolled members, in common with all other residents of the Counties, any and all of these functions and services as the payments herein provided will, in the exclusive judgment of the several boards of commissioners, permit.

3. No payment by the Tribe to the Counties shall accrue or be payable to the Counties until Congress has enacted and the President has approved an Act in substance and effect the same as HR-2432 (81st Congress) as passed by the House of Representatives of said Congress and as favorably reported out of the Committee on Interior and Insular Affairs, United States Senate, said bill being commonly referred to as the Colville Restoration Bill. The first payment by the Tribe under the provisions of this agreement shall become payable to the Counties in the calendar year in which such Act becomes law. The two succeeding payments accruing to the Counties under the provisions of this agreement shall be payable to the Counties one year and two years, respectively, after the

date of the first payment.

4. In the event that subsequent to the enactment of the Colville Restoration Act more particularly described in paragraph 3 above (and prior to the payment by the Tribe to the Counties of any one or more of the annual payments provided for by this agreement), tribally owned and/or tribally held lands within the boundaries of the Colville Indian Reservation shall become subject to state, county and/or local taxation, the Tribe may at its option and without liability, rescind this contract and make no further payments hereunder.

5. In the event that this contract has not been rescinded under the provisions of paragraph 4 hereof, the Tribe and the Counties shall, before or within the seventh month following the making of the third payment herein provided for and within the seventh month following the making of any succeeding third annual payment as determined under the provisions of this paragraph, endeavor to mutually agree upon the annual amount to be paid by the Tribe to the Counties under the provisions of paragraphs 1, 2 and 3 of this agreement for the next succeeding three-year period. In the event that the Tribes and the Counties are unable to agree upon the amount of said annual payment within said seventh month as hereinabove defined, the Board of County Commissioners of each of the Counties shall appoint one of its members, and the Business Council of the Confederated Tribes of the Colville Reservation shall appoint two of its members to arbitrate and determine the amount to be paid by the Tribe to the Counties during the next succeeding three-year period. In the event that the arbitrators so selected and appointed by the Tribe and the Counties fail to reach an agreement as to the amount of said annual payment within the eighth month following the making of the third payment herein provided for and within the eighth month following the making of any succeeding third annual payment as deter-

mined under the provisions of this paragraph, the Tribe and the Counties agree that the amount to be paid by the Tribe to the Counties during the next succeeding three-year period shall be settled by arbitration in accordance with the Rules of the American Arbitration Association. The Tribe and the Counties, their arbitrators, and the American Arbitration Association, in their respective efforts to determine the amount of annual payments to be paid by the Tribe to the Counties for each three-year period, shall give paramount consideration to the financial ability of the Tribe to make such payments and shall use as a base in making said determination of financial ability the net income of the Tribe during the fiscal years ending on June 30, 1953 and June 30, 1954, and its relationship to the $40,000.00 annual payments provided for under the provisions of this agerement for the initial three-year period. Such recoveries, if any, as the Tribe may realize out of its claims now pending before the Indian Claims Commission shall not be considered as income of the Tribe.

6. This agreement shall not be binding upon the Tribe until it has been approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

IN WITNESS WHEREOF, the parties have affixed their signatures hereto the day and year first above written.

THE CONFEDERATED TRIBES
OF THE
COLVILLE RESERVATION

By s/
J. D. White, Chairman
Colville Business Council

ATTEST:
s/
Nellie Rima, Secretary
Colville Business Council

OKANOGAN COUNTY

By: s/ Willard Elwell
Commissioner

By: s/ Ben Brown
Commissioner

By: s/ Walter R. Turner
Commissioner

FERRY COUNTY

By: s/ George H. R. Stabenfeldt
Commissioner

By: s/ A. J. Lawson
Commissioner

By: s/ Joseph A. Kohler
Commissioner

APPROVED THIS 21st DAY OF APRIL, 1954:
s/
Floyd H. Phillips, Superintendent
Colville Indian Agency

APPROVED THIS ..... DAY OF ....., 1954:
Glenn L. Emmons
Commissioner of Indian Affairs

APPROVED THIS ..... DAY OF ....., 1954:
Douglas McKay
Secretary of the Interior

APPENDIX F

MEMORANDUM December 17, 1971

Chairman, Colville Business Council
ATTN: Law & Order

FROM: Tribal Executive Secretary

SUBJECT: Payments to Ferry & Okanogan Counties
RE: Law & Order

Since the assumption of civil and criminal jurisdiction on the Colville Indian Reservation by the State of Washington (January 29, 1965) the Confederated Tribes of the Colville Reservation have been financially contributing funds to the counties of Okanogan and Ferry for their maintenance of law and order on the Colville Indian Reservation. There was no formal agreement other than by resolution, 1965-52, and the Tribes annually budgeting funds for this purpose.

Originally the Tribes agreed to contribute the sum of $8,500.00 annually to Ferry County which was increased to $10,000.00 by resolution 1966-172 in 1966; and the Tribes have been annually budgeting the sum of $16,800.00 for Okanogan County since inception of these financial contributions made since 1965. I might inject here that these payments are in addition to the $40,000.00 annual payment to the Counties in accordance with Public Law 772.

The payments made to the Counties since 1965 thru 1970 are as follows:

OKANOGAN COUNTY

Fiscal Year	*Amount Budgeted*	*Amount Paid*	
1965	$ 4,200.00	$ 4,200.00	
1966	16,800.00	15,592.35	
1967	16,800.00	12,606.55	
1968	16,800.00	15,400.00	
1969	16,800.00	22,387.90	
1970	16,800.00	16,800.00	
TOTALS	$83,200.00	$86,986.90	($1213.10 unused)

Note: In Fiscal Years 1968 and 1969 the Business Council permitted the unused balances budgeted to be carried over to the next fiscal year.

FERRY COUNTY

Fiscal Year	*Amount Budgeted*	*Amount Paid*	
1965	$ 2,125.00	$ 2,125.00	
1966	8,500.00	8,500.00	
1967	10,000.00	10,000.00	
1968	10,000.00	9,959.97	
1969	10,000.00	10,000.00	
1970	10,000.00	10,000.00	
TOTALS	$50,625.00	$50,584.97	$40.03 unused

The initial payments made to the counties in 1965 were for the last fiscal year quarter only, and payments made to the counties were in accordance with the quarterly billings for each county.

In 1969 the Counties requested that the annual sum financially contributed by the Tribes be increased. Ferry County requested an increase to $13,340.00 from $10,000.00; and Okanogan requested an increase to $26,370.00 from the original $16,800.00. These increases were denied by Resolution 1969-310, a copy which is attached. No payments were made to the Counties by the Tribes in Fiscal Year 1971.

A more detailed report regarding these payments will be made upon request since I have a full documented file on this subject matter.

/s/ HARRY OWHI
Executive Secretary
Colville Business Council

Attachments Res. 1969-210
1965-52

AUG 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON,
Respondents.

On Appeal from the Supreme Court of Washington

BRIEF FOR AMICUS CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT

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WILSON - EPES PRINTING CO., INC. - RE 7-8002 - WASHINGTON, D. C. 20001

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BRIEF FOR AMICUS CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief is filed with the consent of both parties.

Amicus Curiae, the National Congress of American Indians (NCAI), is a nonprofit association of some 147 Indian tribes, including virtually all of the major organized tribes except the Navajo Tribe. Its purpose is to promote the interests of American Indians. It was in-

corporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

NCAI supports the position of the Appellant Indian, Leonard Tonasket, and joins him in asserting that the decision of the Washington Supreme Court was erroneous. NCAI is deeply concerned with the Washington court's decision, because it represents one more example of a state attempting to extend its jurisdiction over a reservation Indian in a way that constitutes a usurpation of the tribe's governmental powers over its people.

SUMMARY OF ARGUMENT

1. Under Public Law 280, reasonably construed, the tribe did not lose any of its sovereign powers, except the power to legislate criminal and civil laws inconsistent with statewide criminal laws. The Act did not grant to the state the sovereign power to tax tribal members on the reservation. This conclusion follows from the ordinary meaning of the language used in the Act, and especially if a strict construction is followed.

2. The State of Washington has never repealed its Constitutional disclaimer of jurisdiction over Indians, and therefore Public Law 280 is not effective in Washington.

ARGUMENT

I. The State of Washington Has No Public Law 280 Jurisdiction to Tax Indians on the Colville Reservation

This case presents to the Court for the first time the fundamental question of whether Public Law 280, in granting to the state criminal and civil jurisdiction over the reservation and extending state criminal and civil laws to the reservation, granted to the state the power

to impose its taxes on Indian transactions within the reservation.

As important as the question of taxation is, the even more fundamental question, on which the Indian tribes of this country subject to Public Law 280 are anxiously awaiting the verdict, is *what powers of self-government did Public Law 280 leave to them?* Not much, apparently, if the ruling of the Washington Supreme Court is upheld.

A. *The Criminal Law Aspect of Public Law 280*

Before analyzing the civil law aspect of P.L. 280, it may be helpful to glance at the criminal law aspect, which is somewhat simpler in its ramifications. It is clear that Congress gave to the state courts criminal jurisdiction over offenses involving Indians, and made state criminal laws applicable to the reservation. By necessary implication, where Public Law 280 applies, Indians are also subject to the state law and order machinery—police, prosecutors, judges, jails, etc.

The big unresolved question is whether the state's jurisdiction is exclusive or concurrent. If concurrent, the tribe would retain the ability to legislate (consistent with state law) and operate its own enforcement machinery in areas that the state neglects to cover. If exclusive, then the tribe's powers of self-government have been much more severely curtailed, and law and order services much less likely to be provided in a satisfactory way.

Any grant of jurisdiction to the state in derogation of tribal self-government should be strictly construed, and only as much jurisdiction granted which plainly and necessarily is encompassed in the language of the Act.[1] Since P.L. 280 did not say that the state's juris-

[1] See *Warren Trading Post Co.* v. *Arizona Tax Comm.*, 380 U.S. 685, 687 (1965); *Kennerly* v. *District Court*, 400 U.S. 423 (1971); and Dept. of the Interior, *Federal Indian Law* (G.P.O. 1958), at

diction would be exclusive, and since exclusive jurisdiction is not necessary in order for the state to acquire and properly exercise what Congress gave it, the jurisdiction should be held concurrent. We should not forget that the tribe's sovereign powers existed long before the state's, and should not lightly be annulled.

It should also be noted that only state-wide criminal laws apply to the reservation.[2] Consequently, local county and municipal ordinances do not apply, and the tribe is free to enact its own local ordinances, consistent with state law.

B. *The Civil Law Aspect of Public Law 280*

The civil law aspect of P.L. 280 presents more or less the same complications, plus the serious question of what laws are included under the term "civil laws." The court below seemed to define "civil laws" as *all*

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395 ("This right of self-government, which has been consistently protected by the courts . . ."), and 396-402. Once a reservation is established or recognized by Congress, subsequent diminutions of that reservation are strictly construed. *United States* v. *Celestine*, 215 U.S. 278 (1909); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *City of New Town* v. *United States*, 454 F.2d 121 (8th Cir. 1972).

[2] Congress did not make *local* state laws applicable to the reservations. P.L. 280 says that criminal and civil laws shall have the same force on reservations as "elsewhere within the State". This implies that only state-wide laws apply to the reservations.

It is interesting to note that enforcement of quasi-criminal municipal ordinances in most states seems to be considered civil proceedings. See, e.g., *Fortune* v. *Incorporated Town of Wilburton*, 5 Ind. Terr. 251, 82 S.W. 738 (1904); *Borough of Ramsey* v. *Basil*, 19 N.J.Misc. 555, 21 A.2d 860 (1941); *City of St. Louis* v. *Stubley*, 154 S.W.2d 407 (Mo.App. 1941); *City of Chicago* v. *Walcher*, 327 Ill. App. 556, 64 N.E.2d 394 (1946); *City of Sioux Falls* v. *Famestad*, 71 S.D. 98, 21 N.W.2d 693 (1946).

non-criminal laws, including laws imposing taxes on citizens. It the court was right, then we can expect the state to assert over the reservation all of its other sovereign powers—for instance, the power to grant licenses and franchises (such as for liquor dispensaries, casinos, etc.), to engage in proprietary activities (power and irrigation projects, ferry operations, etc.), to regulate tribal enterprises, and so on. If the state now has these powers, the tribal powers of self-government are correspondingly diminished.

Is this what Congress intended?

P.L. 280 has two operative clauses relevant to the civil aspect. The first says—

> "[the state] shall have jurisdiction over *civil causes of action* between Indians or to which Indians are parties. . . ." (Emphasis added)

The second says:

> ". . . those civil laws of the State that are of general application to *private* persons or *private* property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . ." (Emphasis added)

We believe a fair reading of these two clauses confirms that Congress never intended "civil laws" to mean the entire array of state non-criminal laws, but rather that Congress intended "civil laws" to mean those laws which have to do with private rights and status. Therefore, "civil laws . . . of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the state's sovereign powers, such as the power to tax, grant franchises, etc. These are not with the fair meaning of "private" laws.

Our reading is supported by the meagre legislative history available to the public.[3] The Senate Report[4] characterized the bill as relating to

> ". . . criminal offenses and *civil causes of action* committed or *arising on Indian reservations* within such States . . ." (Emphasis added)

This certainly does not reveal an intent that the state would acquire broad sovereign powers over Indians such as the taxing power.

The dictionary meaning of "civil" corroborates our reading of P.L. 280. Webster's New International Dictionary, Second Edition, defines "civil" as follows:[5]

> "8. *Law.* Relating to the private rights of individuals in a community and to legal proceedings in connection with them; pertaining to rights and remedies sought by action or suit distinct from criminal proceedings . . ."

There is nothing here to hint of the great sovereign powers which the state claims it received.

In a number of cases, courts have held that certain non-criminal proceedings involving exercise of sovereign

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[3] There are no published hearings. We understand that an unedited transcript of hearing exists in the House Committee files at National Archives, but since 1953 the House has instructed Archives to permit review only of published material (and then only on special permission of the House Clerk), and so we were unable to review this transcript.

[4] S.Rept. 699, 83d Cong. (1953), reprinted U.S. Code Cong. & Admin. News (1953) at pp. 2409-2414.

[5] And hundreds of cases say practically the same thing. See cases collected at 7 *Words and Phrases*, pp. 332-378.

powers are not "civil" proceedings.[6] Of course those were special contexts and of little relevance here, yet they add further corroboration to the normal connotation of "civil" (especially as used in P.L. 280) as referring to private rights, as opposed to sovereign powers over citizens. Congress was not concerned that the states lacked these powers on the reservation, but with the absence of a functioning system for the resolution of private rights.

In conclusion, it seems clear that Congress had in mind a more normal definition of "civil laws" than the court below supposed, and if there is any doubt about it, the doubts should be resolved in favor of preserving the tribal powers of self-government.[7]

We leave the subject with the note that there are some tribes as to whom the state has asserted only partial jurisdiction in enumerated areas. One example is the Quinault Tribe of Washington, as to whom the state asserts exclusive jurisdiction on all subject matters occurring on fee land within the reservation, but on Indian trust land it asserts its jurisdiction only in a few enumerated areas.[8] This has created a checkerboard nightmare

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[6] *Epperson* v. *Johnson*, 190 Okla. 1, 119 P.2d 818 (1941) (condemnation proceeding); *Los Alamos School* v. *State*, 35 N.M. 122, 290 Pac. 1019 (1930) (taxpayer's action for refund); *Halverstadt* v. *Berger*, 72 Neb. 462, 100 N.W. 934 (1904) (appeal from order of village board re liquor license); *Clarke* v. *City of Evansville*, 75 Ind. App. 500, 131 N.E. 82 (1921) (appeal from assessment for street improvement); *City of Burlington* v. *Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514 (1898) (proceeding before railroad commission); *Bowen* v. *Department of Social Security*, 14 Wash. 2d. 148, 127 P.2d 682 (1942) (appeal from decision of the Washington Department of Social Security).

[7] As this Court is well aware, statutory ambiguities are construed in favor of the Indians. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Squire* v. *Capoeman*, 351 U.S. 1 (1956). And see note 1 above.

[8] Family, juvenile, insanity, welfare and traffic matters. The system was described in *Quinault Tribe* v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966).

for the law enforcement authorities, because as far as criminal law is concerned, federal and tribal laws applies to trust land, and state law to fee land. Understandably, the state law enforcement officials have given up, and simply do not normally provide law and order services at all on the reservation.

Another example is the Flathead Tribe of Montana, which has a system modeled after the Washington statute, but with differences that make it practical.[9] Obviously in a case such as Flathead, the taxing power would not vest in the state, because not enumerated in the tribal acceptance of limited state jurisdiction.

II. The Statute of Washington Has No Public Law 280 Jurisdiction at All Over the Colville Reservation

The State of Washington has never validly accepted Public Law 280, and therefore cannot base its taxing power over Indians on that Act.

The Washington Constitution, Article 26, has provided ever since the state entered the Union in 1889, that—

> ". . . the people inhabiting this state do agree and declare that . . . all lands . . . owned or held by any Indian or Indian tribes . . . shall remain under the absolute jurisdiction and control of the congress of the United States. . ."

Some eight states have similar constitutional disclaimers, and Congress was aware of them when it en-

[9] The chief difference is that the Flathead arrangement is consensual, while the Quinault arrangement is imposed over the Indians' objections. The Flathead Tribe has accepted state jurisdiction over the same subject matters as enumerated in the preceding note, plus the criminal area. However, at Flathead this partial jurisdiction applies to all land, regardless whether in fee or trust, and the Flathead Tribe made it clear that it was retaining concurrent jurisdiction. At Quinault, the state insists that its jurisdiction is exclusive, so that the Tribe is supposedly not allowed to cover areas neglected by the State.

ed Public Law 280. Section 6 of P.L. 280 gives the sent of the U.S. to these states to amend their con- utions to remove the disclaimers. Section 6 concludes, vever,

> "That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be."

Vashington has not even tried to amend its Constitu-, so it would certainly seem that Public Law 280 not become effective in that state.

But in 1966 the Ninth Circuit held [10] that the above ted Section 6 of P.L. 280 did not mean what it said; that Washington could assert jurisdiction over In- lands whether it amended its constitution or not.[11] tiorari was sought from this Court, and the Indian e, the state, and the United States all agreed that Court should review the Ninth Circuit's decision. vertheless, certiorari was denied.[12]

The issue remains alive, and subject to being raised in ry relevant case arising in Washington until this rt disposes of it. Not having been raised below or fed here, we appreciate that the Court will not wish decide this issue now. Nevertheless, there is a latent

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Quinault Tribe v. *Gallagher*, 368 F.2d 648 (9th Cir. 1966). The t first dismissed the case for lack of $10,000 being involved, 368 at 651-5, but shortly after, Congress removed this requirement Indian tribes, and the court accepted jurisdiction on rehearing. en denied relief on the merits. 368 F.2d 655-8.

This was certainly not the attitude of this Court in *Kennerly istrict Court*, 400 U.S. 423, 427 (1971), where P.L. 280's re- ement of affirmative legislative action was held no "idle choice ords."

387 U.S. 907.

fundamental defect in the state's case, which has strong color of argument on its face, and we thought the Court should be aware of it.

CONCLUSION

This Court should reverse the decision of the Washington Supreme Court, and declare that the State of Washington has no power to tax Indians on the Colville Reservation.

Respectfully submitted,

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August 18, 1972

IN THE

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OF THE

UNITED STATES

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ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant,*

v.

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LEONARD TONASKET, *Appellant,*

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ON CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO, AND ON APPEAL FROM SUPREME COURT OF ARIZONA AND SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

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BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

STATEMENT OF INTEREST

This brief is submitted, with the written consent of the parties, to permit the Multistate Tax Commission to supplement the arguments of the appellees in each of these causes.

The Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact entered into by twenty-one states as full members, and by fifteen states as associate members.[1]

It is significant to the Multistate Tax Commission that the applicability of various state excises as pertains to Indians and the Indian tribal organizations both on and off the reservations and in reference to sales to both Indians and non-Indians be clarified by this court. In *Mescalero*, there is a question posed concerning the the excise tax status of business operations off the reservation, apparently conducted by an organized Indian tribe through a corporation organized by the tribe. *McClanahan* involves the application of an income tax to an Indian in her individual capacity as a resident of the state of Arizona residing on the Navajo reservation where she earns the income. *Tonasket* is concerned with cigarette sales primarily to non-Indians by an individual Indian on his allotted land on the Colville tribe reservation, jurisdiction over which has been conceded to the state of Washington.

Each of these cases poses serious tax problems for many of the Multistate Tax Commission members. Stretched to their ultimate conclusions, argu-

[1]The legislatures of 21 states have enacted the Multistate Tax Compact, thereby making those states regular members of the Commission. Those states are: Kansas, Washington, Texas, New Mexico, Illinois, Florida, Nevada, Oregon, Missouri, Nebraska, Arkansas, Idaho, Hawaii, Colorado, Wyoming, Utah, Montana, North Dakota, Michigan, Alaska and Indiana. One state, Alabama, has enacted the Compact subject to Congressional legislative consent. Pending enactment of such consent, Alabama is considered to be an associate member state. Fourteen other states are associate members at the request of the respective governors. Those states are: Arizona, California, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia.

ments in these three cases against state tax jurisdiction would free from any state excise taxes the business and other income-producing activities of all Indians, whether carried on within the confines of an Indian reservation or outside the Indian reservation, and whether carried on by an individual Indian or by a tribe or by an independent corporation created by the tribe.

STATEMENT OF FACTS

The significant facts in each of these cases have been set forth in other briefs, and need not be repeated here in any detail. In bare outline, they are as follows:

1. **Tonasket.**

Tonasket, a full blood member of the Colville tribe, conducts a retail business (primarily for the sale of cigarettes) which he owns on his allotted lands on the Colville Indian reservation. He purchases name brand cigarettes from out-of-state distributors and then sells them primarily to non-Indians free of any state tax. The federal cigarette tax is paid on all cigarettes which he sells. It is clear that profits from Tonasket's business are subject to the federal income tax. The Colville tribe has given its consent to the state of Washington to assume criminal and civil jurisdiction, which Washington has done pursuant to Public Law 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), and chapter 37.12 Revised Code of Washington (RCW).

2. **McClanahan.**

McClanahan is a full blood member of the Nav-

ajo tribe; resides on the Navajo reservation in Arizona; and earns wages from employment on the reservation. It is clear that her income in question is subject to the federal income tax.

3. **Mescalero**

The Mescalero Apache tribe has constructed and operates ski resort facilities on properties off the reservation leased by a tribal corporation from the United States Forest Service. The development of the facilities was made possible by loans from the United States under authority of 25 U.S.C. 470, but the facilities were built by and are operated by the tribal corporation subject to federal approval as to plans for initial facilities, construction of improvements and arrangements for sub-leasing, budgeting and accounting.

SUMMARY OF ARGUMENT

There is no question, as pertains to these three cases (*Mescalero*, *McClanahan* and *Tonasket*), that the location of the respective taxable activities is within the territorial limits of the respective states which are asserting jurisdiction. No treaties, statehood enabling legislation or federal statutes remove these locations from the territorial limits of the respective states. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L ed 1091 (1930); *State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 90 L ed 261 (1946); *United States v. McGowan*, 302 U.S. 535, 82 L ed 410 (1938); *United States v. McBratney*, 104 U.S. 621, 26 L ed 869 (1882); *Draper v. United States*, 164 U.S. 240, 41 L ed 419 (1896); *Thomas*

v. Gay, 169 U.S. 264, 42 L ed 740 (1898); *Wagoner v. Evans*, 170 U.S. 588, 42 L ed 1154 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 50 L ed 398 (1906); *Williams v. Lee*, 358 U.S. 217, 3 L ed 2d 251 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L ed 2d 573 (1962). It is clear then that jurisdiction exists in a general sense. The question is whether or not it exists in terms of the specific manner in which it is exercised in these tax cases.

The question is answered by an analysis of the legal principles which apply to these respective matters. None of these principles would preclude the exercise of jurisdiction. The states of Washington, New Mexico and Arizona are not taxing any property or interests in property. The taxes in issue are general excise taxes imposed on income or receipts derived from employment or business operations.

In the *Tonasket* case, there is an affirmative assumption of criminal and civil jurisdiction by the state of Washington and a relinquishment of jurisdiction by the Colville tribe pursuant to applicable federal (PL 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), *supra*),[2] state (chapter 37.12 RCW, *supra*), and tribal law (Colville Business Council Resolution 1965-4). Any claimed tax immunity in the *Tonasket* case must first be predicated on the argument that the controlling federal statute does not mean what it says. Assuming, *arguendo*, that the federal statute (PL 280) does not mean what it says, Tonasket must establish either (1) that he is

[2]Hereinafter referred to as PL 280.

a federal instrumentality and thus impliedly immune from state excise taxes in his private profit proprietary endeavors, or (2) that the United States has preempted the field. Since there is no reason to suppose that the doctrine of implied governmental immunity is broader as pertains to Indians in their individual capacity than to anyone else, it is clear that this doctrine does not grant Tonasket any exemption. Furthermore, there has been no preemption because Tonasket is not in any way regulated by the federal government in regard to the sales in which the state of Washington is interested, namely, his sales to non-Indians (Washington exempts from its cigarette tax laws sales by Indians to Indians).

In *McClanahan*, the only restriction applicable is that of implied governmental immunity. It is no more applicable to *McClanahan* than to *Tonasket*.

In *Mescalero*, the issues are again those pertaining to preemption by the Congress and to implied governmental immunity. There is no preemption because the Indian Trader Act applies only to traders on the reservation. Furthermore, no exemption from state taxation can be inferred from the fact that the federal government loaned money to finance and took the normal lender precautions of overseeing the utilization of that money within the terms of the loan. Nor may immunity be inferred from the fact that the ski resort is located on federal forest lands leased to the tribe. Finally, in conducting a *proprietary enterprise*, the tribe is not impliedly immune from state excise taxes under the doctrine of implied governmental immunity.

Apart from any consideration of express federal legislation (PL 280), *Mescalero*, *McClanahan* and *Tonasket* are controlled by the tax decisions of this court upholding taxation of Indians in the Oklahoma estate tax cases of *Oklahoma Tax Com. v. United States*, 319 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Commission*, 334 U.S. 717, 92 L ed 1676 (1948); the United States income tax cases of *Five Civilized Tribes v. Com'r of Int. Rev.*, 295 U.S. 418, 79 L ed 1517 (1935), *Choteau v. Burnet*, 283 U.S. 691, 75 L ed 1353 (1931); *Com'r of Int. Rev. v. Walker*, 326 F.2d 261 (CCA 9th, 1964); and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 82 L ed 907 (1938); and the state income tax case of *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420, 80 L ed 771 (1936); and property and excise tax cases such as *McCurdy v. United States*, 246 U.S. 263, 62 L ed 706 (1918), *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L ed 709 (1928), and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F 2d 1184 (CCA 9th, 1971), cert. den. U.S. Supreme Court February 22, 1972.

Arguments for appellants' position in these causes proceed upon the erroneous assumption, contrary to the *Kake* case, *supra*, and to decisions referred to both herein and in *Kake*, that the states possess no tax jurisdiction over Indians except as specifically authorized by Congress. Since there is no expressed or implied prohibition to the tax impositions here questioned, appellants' arguments are clearly fallacious.

The *Kake* case, *supra*, and *Williams v. Lee*, *supra*, establish the principle that the states have a residual jurisdiction over Indian affairs subject to two conditions: (1) That Congress has not preempted the field, and (2) that the exercise of state jurisdiction does not interfere with the Indians' right of self-government.

Where there is no conflict between federal and state authority, and when the state action is in an area left void *in fact* by Indian local self-government, both logic and necessity dictate that state law should fill the gap.

ARGUMENT

1. An Indian Reservation is Within the Territorial Jurisdiction of The State in Which it is Located.

Premised on the early cases of *Worcester v. Georgia* (U.S.), 6 Pet. 515, 8 L ed 483; *Kansas Indians* (*Blue Jacket v. Johnson County*) (U.S.), 5 Wall 737, 18 L ed 667 (1866); and *New York Indians* (*Fellows v. Denniston*) (U.S.), 5 Wall 761, 18 L ed 708 (1866), the argument is made on behalf of the appellants in these causes that the states have no jurisdiction over Indian reservations except as expressly authorized by Congress. This argument is best expressed in terms of geography; an Indian reservation is "off limits" to state jurisdiction. However, under later cases such as *Kake v. Egan*, *supra*, 369 U.S. 60, 70 L ed 2d 573 (1962); *Surplus Trading Co. v. Cook*, *supra*, 281 U.S. 647, 74 L ed 1091 (1930); *New York ex rel. Ray v. Martin*, *supra*, 326 U.S. 496, 90 L ed 261 (1946); *United States v.*

McGowan, supra, 302 U.S. 535, 82 L ed 410 (1938); and *Williams v. Lee, supra*, 358 U.S. 217, 3 L ed 2d 251 (1959), any such territorial approach to the problem of state taxing jurisdiction is unwarranted, and obscures the true nature of the problems in the instant cases.

Surplus Trading Co. v. Cook, supra, described the conditions under which the states may exercise jurisdiction over Indian reservations, as follows:

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
>
> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" (281 U.S. at 650-651.)

An even more unqualified statement was made in *State of New York ex rel. Ray v. Martin, supra*:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. at 499, quoted with approval in *Kake v. Egan*, 369 U.S. at 74.)

In *United States v. McGowan, supra*, this court held, with reference to the Reno Indian colony in Nevada, which was purchased by the United States for use of Indians:

> "The Federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the Federal enactments." (302 U.S. at 539.)

As more recently stated by this court in *Kake v. Egan, supra*:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v Georgia (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (Blue Jacket v Johnson County) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; * * * that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. *By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.* [Citation omitted.] In Langford v Monteith, 102 US 145, 26 L ed 53, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In United States v McBratney, 104 US 621, 26 L ed 869, and Draper v United States, 164 US 240, 41 L ed 419, 17 S Ct 107, the Court held that murder of one non-Indian by another on a reservation was a matter for state law." (369 U.S. at 72-73.) (Emphasis added.)

In *Williams v. Lee, supra*, this court, in commenting on the principles enunciated in *Worcester v. Georgia, supra*, stated as follows:

> "* * * Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. * * * Essentially, absent governing Acts of Congress, *the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.* * * *" (358 U.S. at 219-220) (Emphasis added.)

These cases point out the proper direction and focus for our inquiry. First, it is to determine whether the effect of the state taxes here in question conflicts with enunciated federal legislation and policies concerning Indian affairs.[3] As will be demonstrated, the taxes in question are not forbidden by any act of Congress or by treaty provisions, and do not directly impinge upon any federal policy. Secondly, our inquiry must determine whether the taxes involved in these causes conflict with tribal self-government. As will also be demonstrated, there is no such conflict.

2. Imposition of the Taxes in the Instant Causes Is Not in Conflict With any Federal Statutes or Regulations Concerning the Individual Indians and the Indian Tribes in Question.

The appellants and the amici curiae for the ap-

[3]The appellants' argument that the states have no jurisdiction over Indians or their lands unless specifically granted by Congress is refuted by their preemption argument. Preemption has application and meaning only where both the federal government and the states have concurrent jurisdiction over the subject matter. The subject matter is preempted by Congress only when Congress exercises jurisdiction in such a manner that any state legislation over the same subject matter would be conflicting.

pellants have not pointed to and do not rely upon any express federal statutes or regulations which expressly prohibit the imposition of the state taxes in question. However, a common argument of the appellants and amici curiae for appellants pertaining to conflicting federal legislation stems from the notion that the taxes in question are taxes somehow imposed upon restricted or trust lands or funds of the Indians and Indian tribal organization in question, such lands themselves being exempt from taxation by reason of express treaty provisions. Such an argument misconceives the legal incidence and nature of the taxes with which we are here concerned. *McClanahan* involves a general income tax on earnings. It has long been settled that an income tax is not a tax on property or an interest in property. An income tax, by its very nature, is an excise tax imposed upon an abstract concept of taxable income. As stated in *Graves v. New York*, 306 U.S. 466, 83 L ed 927 (1939):

> "• • • The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, [cases cited] • • •" (306 U.S. at 480)

The same is true in regard to the New Mexico gross receipts tax and compensating (use) taxes involved in *Mescalero* and the Washington cigarette tax involved in *Tonasket*. A tax upon the use or sale of property is not a tax on the property. *Sullivan v. United States*, 395 U.S. 169, 23 L ed 2d 182 (1969); *United States v. Detroit*, 355 U.S. 466, 2 L ed 2d 424

(1958). Indeed, if these taxes were considered property taxes, they would undoubtedly be invalid by reason of *state law*, as their imposition would violate state constitutional property tax uniformity requirements.[4]

The congressional policy of exempting from state and federal taxes trust or restricted property of Indians or Indian tribal organizations is not applicable to these causes. This type of property was the subject of taxation involved in *Squire v. Capoeman*, 351 U.S. 1, 100 L ed 883 (1956). That case properly held that the federal income tax could not be applied to the proceeds of timber taken from the land since it was in substance a tax on the land. In contrast, the taxes in the instant causes are personal income or general business excise taxes. Their incidence does not fall on any property or interest in property.

A second common argument, related to the first, is that since the taxes in question under state law can create liens for collection against tax exempt property of the Indians, the taxes themselves are invalid. However, the validity of the imposition of a tax does not turn on whether or not all of the assets or property of the taxpayer are available for enforcement of the tax by lien, attachment, execution, or otherwise. This court can take judicial notice of the

[4]This conclusion follows because the imposition of an additional tax on some property and not on other property violates the common uniformity requirements of equality of rate of taxation. For example, if a use tax were a tax on property, its imposition on property acquired during the tax year would impose an additional tax and thus higher rate on this property compared to all other property for the year in which it was acquired. Cooley on Taxation, Vol. 1 (4th ed.), § 260, 292.

fact that not all property of every citizen is available to meet validly imposed tax obligations. This alone does not invalidate a tax.

In *United States v. Alabama*, 313 U.S. 247, 85 L ed 1327 (1941), this court recognized the validity of a state tax and the lien arising thereunder, even though the lien could not be enforced against the United States without its consent because of federal ownership of the property subject to the lien.

The precise question of collection of a state tax from Indian restricted or trust property was faced by the court in *West v. Oklahoma Tax Commission*, *supra*, 334 U.S. 717, 92 L ed 1676 (1948). This court there noted:

> "• • • It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien." (334 U.S. at 725)
>
> "The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission Case permits that liability to be imposed. • • •" (334 US at 727)

Thirdly, the appellants suggest that federal legislation generally establishing a protective policy

toward the Indians and their lands supports the tax exemption here claimed. This protective policy which placed the Indian in a ward or dependent status was not only implemented by restrictions on the Indian's ability to dispose of his land, but was also implemented by the Indian Trader Act (25 USC §§ 261-264)* and specific policies and programs of the government for the economic rehabilitation of the Indians.

However, the fact that in these particulars Congress has sought to treat the Indian as a ward or dependent of the United States does not create any general immunity from state taxation.

As noted by this court in *Oklahoma Tax Com. v. United States, supra*:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, supra (295 US 421, 79 L ed 1520, 55

*As shown in the brief of appellees' in *Tonasket*, the Indian Trader Act has no application in any of these cases, for the reason that the activities taxed in these causes are in no way regulated by the Indian Trader Act.

S Ct 820). 'Wardship with limited power over his property' did not there 'without more render [the Indian] immune from the common burden.' * * *"

The correctness of this court's refusal to consider the wardship or dependency status of the Indian as a basis for tax exemption is reinforced by the limited nature of the overall protective policy mentioned above.

Coupled with this protective policy was the policy of removing the Indian and his land from any dependent or wardship relation with the United States, while preserving tribal customs and laws. Such, for example, was the purpose of the Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 U.S.C. 461 *et seq.*). The following sections of the United States Code are provisions of this act and embody those dual policies.

25 U.S.C. § 465 authorizes acquisition of lands for Indians which are tax-exempt and held in trust. Up to $2 million may be appropriated for this purpose. In congressional debate on this section, the purpose was stated to be consolidation of badly checker-boarded reservations and supplementation of Indian stock grazing and forest lands, 78 Cong. Rec. 11730.

25 U.S.C. § 470 establishes a $20 million revolving fund and authorizes loans to Indian chartered corporations for the purpose of promoting economic development of tribes and members. Congress intended this provision to be broad enough to permit loans to corporations or individual members, 78 Cong. Rec. 11730.

An Indian chartered corporation for profit does not have the same status as an Indian tribe under the Indian Reorganization Act of 1934. The latter is organized for *governmental purposes* under 25 U.S.C. § 476. The former is organized under 25 U.S.C. § 477 and requires petition by one-third of the adult Indians and ratification by a majority of them of a corporate charter. Such charter may convey to the incorporated tribe power to manage real and personal property and "such further powers as may be incidental to the conduct of corporate business, *not inconsistent with the law*," 25 U.S.C. § 477. (Emphasis added.)

The intent of congress in separating its appropriations for land acquisition and loans, as well as its provisions for tribal and corporate organization, is clear. Tribal organization and the consolidation of reservations further the federal policy of preserving Indian customs and management of their *own* affairs. Corporate organization and the loan fund further the federal policy of integrating the Indians into the American economic life. As the sponsor of the Indian Reorganization Act stated:

> "* * * the program of self-support and of business and civic experience in management of their own affairs * * * will permit increasing numbers of Indians to enter the white world on a footing of *equal* competition." (78 Cong. Rec. 11732) (Emphasis added.)

This goal of economic integration is being attained; as instances of this, we need only look to the cigarette selling activities of Mr. Tonasket, and the ski resort enterprise of the Mescalero Apache Tribe.

Their activities are in direct competition with similar non-Indian business enterprises, and their financial success depends upon essentially non-Indian market or clientele.

Neither property tax exemptions on trust or restricted land, nor possible collection problems, nor wardship status should exempt these activities from the common tax burden, or provide the basis for implying a congressional intent that there be such an exemption.

> "This Court has repeatedly said that tax exemptions are not granted by implication. * * * It has applied that rule to taxing acts affecting Indians as to all others." (*Oklahoma Tax Com. v. United States*, 319 U.S. at 606.)

3. **The Principle of Implied Governmental Immunity Does Not Free The Appellants From the Taxes in Question.**

In substance, the appellants and amici curiae in these causes argue for the application of the principle of implied governmental immunity. However, the fact that the taxes in question here may have indirect or remote effect on some United States government policy concerning Indian affairs, or on self-government reserved to the Indian tribes by treaty, does not control.

The instant cases present, we suggest, a familiar problem in a perhaps less familiar context, i.e., the problem of implied governmental tax immunity. The decisions of this court on the question of state taxing power as it affects federal activities, and the decisions on the question of federal taxing power as

it affects state activities, provide clear guidelines for resolving the problem of state taxing power as it affects Indian activities. We also suggest that the pattern of this court's decisions is to resolve questions in each of these three separate areas on a consistent basis, and that the clear trend of these decisions, in each of the three areas, is to narrow the scope of implied tax immunity, be that immunity invoked on behalf of the United States, a state, or an Indian. This narrowing has occurred primarily through a complete discarding of the former "economic burden" test. See generally *Graves v. New York, supra,* 306 U.S. 466, 83 L ed 927 (1939); *Helvering v. Mountain Producers Corp., supra,* 303 U.S. 376, 82 L ed 907 (1938); *Oklahoma Tax Com. v. Texas Co.,* 336 U.S. 342, 93 L ed 721 (1949); *Alabama v. King & Boozer,* 314 U.S. 1, 86 L ed 3 (1941); *Curry v. United States,* 314 U.S. 14, 86 L ed 9 (1941); *James v. Dravo Contracting Co.,* 302 U.S. 134, 82 L ed 155 (1937); *Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania,* 318 U.S. 261, 87 L ed 748 (1943); *Esso Standard Oil Co. v. Evans,* 345 U.S. 495, 97 L ed 1174 (1953); *United States v. City of Detroit, supra,* 355 U.S. 466, 2 L ed 2d 424 (1958).

Of these cases, *Oklahoma Tax Com. v. Texas Co., supra, Helvering v. Mountain Producers Corp., supra* and *Oklahoma Tax Com. v. United States, supra* are of special importance.

In *Oklahoma Tax Com. v. Texas Co., supra,* this court had before it the question of:

> "* * * whether a lessee of mineral rights in allotted and restricted Indian lands is immu-

nized by the Constitution against payment of nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. * * *" (336 U.S. at 343)

In answering this question, the court noted:

"* * *[I]t has long been established that property owned by a private person and used by him in performing services for the Federal Government is subject to state and local ad valorem taxes. * * *" (336 U.S. at 350)

"Moreover, even if the status of respondents as federal instrumentalities, in the sense in which they use the term, were fully conceded, it seems difficult to imagine how any substantial interference with performing their functions as such in developing the leaseholds could be thought to flow from requiring them to pay the small tax Oklahoma exacts to satisfy their shares of the state's expense in maintaining and administering its proration program. * * *" (336 U.S. at 351)

The Court then noted the uniform pattern which had developed both in the area of state taxation and in the area of federal taxation:

"* * * this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one." (336 U.S. 352)

This court then analyzed in detail the history of some of the immunity cases as pertained to Indians. It attributed particular importance to *Helver-*

ing v. Mountain Producers Corp., supra, 303 U.S. 376, 82 L ed 907 (1938), a case involving federal taxing power over an alleged state instrumentality.

In *Helvering* the court found that a lessee under an oil and gas lease of state school lands is not entitled to immunity, as a state instrumentality, from federal taxation in respect of income derived from operations under the lease. This same rule was applied in *Oklahoma Tax Com. v. Texas Co., supra,* to the state taxes there involved. The *Helvering v. Mountain Producers Corp.* test, quoted in *Oklahoma Tax Com. v. Texas Co., supra,* is that:

> "* * * immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. * * *" (303 U.S. at 386)

In *Helvering,* the court further refined the test by stating:

> "* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. * * *" (303 U.S. at 386-387)

In *Oklahoma Tax Com. v. United States, supra,* 319 U.S. 598, 87 L ed 1612 (1943), in upholding an Oklahoma estate tax, the court again affirmed *Helvering v. Mountain Producers Corp., supra,* and noted that:

"* * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." (319 U.S. at 604)

"* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." (319 U.S. at 608)

"Recognizing that equality of privilege and and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York, 306 US 466, 83 L ed 927, 59 S Ct 595, 120 ALR 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 US 405, 82 L ed 1427, 58 S ct 969, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 US 277, 83 L ed 1289, 59 S Ct 838, 122 ALR 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623, supra, repudiated former decisions seriously limiting state and federal power to tax. See also Metcalf v. Mitchell, 269 US 514, 70 L ed 384, 46 S Ct 172, and James v. Dravo Contracting Co. 302 US 134, 82 L ed 155, 58 S Ct 208, 114 ALR 318. The trend of these cases should not now be reversed." (319 U.S. 610)

The holding of *Oklahoma Tax Com. v. United States, supra,* was reaffirmed in *West v. Oklahoma Tax Commission, supra,* 334 U.S. 717, 92 L ed 1676

(1948), and extended to property held in trust by the United States for the benefit of the decedent Indian and his heirs. The court there noted that its decision in *Oklahoma Tax Com. v. United States, supra,* foreclosed an application of *United States v. Rickert,* 188 U.S. 432, 47 L ed 532 (1903).

Thus, *Rickert* provides no basis for resurrecting discarded notions of implied immunity, and should be confined to its facts, *i.e.,* to a situation in which a property tax was imposed directly upon property owned by the United States for the use and benefit of an Indian.

The reference, in *Oklahoma Tax Com. v. United States, supra,* to the applicability of the federal estate tax to Indians highlights an important principle established by *Helvering v. Mountain Producers Corp., supra, Oklahoma Tax Com. v. Texas Co., supra,* and *Oklahoma Tax Com. v. United States, supra.* Absent a clearly expressed congressional intent to the contrary, Indian immunity from state taxation (or lack thereof) should parallel Indian immunity from federal taxation (or lack thereof) and each should be determined by the same test.

This principle is also established by decisions of this Court involving state and federal taxation of Indian income.

Choteau v. Burnet, supra, 283 U.S. 691, 75 L ed 1353 (1931); *Five Civilized Tribes v. Com'r of Int. Rev., supra,* 295 U.S. 418, 79 L ed 1517 (1935); *Leahy v. State Treasurer of Oklahoma, supra,* 297 U.S. 420, 80 L ed 771 (1936). *Choteau* upheld the

imposition of the federal income tax on income received by a member of an Indian tribe as his share of royalties from oil and gas leases of tribal land, which was payable to him without restriction. *Leahy* upheld the imposition of a state income tax upon a competent member of the Osage tribe on income from his share of restricted mineral resources of the tribe.

This court there noted:

> "The facts are substantially the same as those presented in Choteau v. Burnet, supra, which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." (297 U.S. at 421)

In *Five Civilized Tribes v. Com'r of Int. Rev.*, *supra*, the court upheld the imposition of the federal income tax on income derived from investment of surplus income from restricted land which was exempt from taxation as long as the title remained in the original allottee. Upholding the tax, the court noted:

> "We find nothing in either [federal statutes concerning the exemption of the land] which expresses definite intent to exclude from taxation such income as that here involved. See Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 581, 72 L ed. 709, 714, 48 S. Ct. 333.
>
> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. [Citation omitted.] The taxpayer here is a citizen of the United States, and *wardship with limited power over his property does not, without more, render him immune from the common burden.*
>
> "Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 72 L ed. 709, 48 S. Ct. 333, supra, held that

> restricted land purchased for a full-blood Creek —ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate." (295 U.S. at 421) (Emphasis added.)

The taxpayers in the instant cases are no more federal instrumentalities, and immune as such from state taxation, than were the taxpayers in *Oklahoma Tax Com. v. United States, supra*, and *Oklahoma Tax Com. v. Texas Co., supra.* And just as their income producing activities are not immunized from the scope of federal taxation, neither should they be immunized from the scope of state taxation.

In *New York v. United States*, 326 U.S. 572, 90 L ed 326 (1946), this court refused to exempt the state of New York from a federal tax imposed upon sales of mineral waters when the state engaged in the business of selling mineral waters. The court then noted:

> "It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for

its taxing power, Metcalf v. Mitchell, 269 US 514, 524, 70 L ed 384, 392, 46 S Ct 172. * * *" (326 U.S. at 588-589)

Applying these principles to the instant cases, it is clear that none of the taxes in question so affect the Indians or the federal government that they must be stricken. They have only an indirect or remote effect on any governmental operations or policies. The *Tonasket* case revolves around the ability of an individual Indian to carry on the business of selling cigarettes free of the Washington cigarette tax. The *McClanahan* case involves the individual income tax liability of an individual Indian. In *Mescalero*, an Indian tribe claims to have the right to construct and operate a ski resort business of substantial magnitude without incurring any state liability whatsoever. It makes this claim even though the property and business in question are located off reservation property.

Indirectly, the appellants and their amici curiae are asking this court to do one of two things: either declare that Indians and their tribal organizations are instrumentalities of the federal government or that Indians and their tribal organizations, to the extent that they implement federal economic policy for the Indians, are so closely related to a federal instrumentality that immunity is to be implied. Neither of these requests is supportable by the case law defining the scope of governmental immunity of the Indians from either state or federal taxation. Furthermore, if the government's objective is to assimilate the Indians into society as competent

equal members of the business community—the stated objective—it is difficult to see how this can be accomplished without them sharing generally in the privileges and responsibilities of government, which includes their bearing their share of general business tax obligations.

Indeed, a striving for equality of tax burdens has been the source for this Court's narrowing of the scope of implied governmental immunity, including the federal instrumentality doctrine. As stated in *Oklahoma Tax Com. v. United States, supra*:

> "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism." 319 U S at 610.

Should the Congress wish to resurrect such favoritism and reverse the trend, it may do so by express enactment. But until it does, the trend of this Court in sweeping away tax favoritism should continue.

4. **The Taxes Imposed in These Causes Do Not Conflict With the Indian Right of Self-Government.**

In *Kake v. Egan, supra*, 369 U.S. 60, 7 L ed 2d 573 (1962), this court rightly noted that:

> "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. * * *" (369 U.S. 74)

As to these decisions, however, the court noted:

> "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. 75)

Does the right of reservation-self-government prohibit the state taxes involved in the instant cases? We suggest that it does not, and that these taxes are perfectly compatible with that right.

If that right be conceived of as including the right to impose a tax upon the same activities or income as the state attempts to tax, no conflict thereby arises. An exercise of the taxing power of even such a sovereign as the federal government in no way precludes state taxation of the same subjects. Concurrent exercise of taxing powers by different sovereigns is an inherent part of our governmental system.

But should that right be conceived of as including the right to be immune from any exercise of state taxing power over commercial enterprises of the tribe or its members? This problem is perhaps presented in its most acute form by the *Mescalero* case, in which either the tribe or a corporation owned by it is the taxpayer. We suggest that, even if the tribal enterprise were fully on the reservation—which it is not—its taxation by New Mexico would not be in conflict with the tribe's right of self-government.

Again, a case from the field of intergovernmental immunity provides the guideline.

The test applied by this court in *New York v. United States*, *supra*, preserves unrestricted the traditional sovereign powers of the state, while at the same time refusing to allow that sovereignty to be a basis for immunizing from taxation state enterprises of the same type as are conducted by private

businesses. Certainly, the right of a tribe to self-government should no more be a shield against taxation than is the sovereignty of a state. Again, tax favoritisms may be established—both for a state or a tribal business enterprise—as a matter of congressional grace. But no such favoritisms should be implied from the concept of self-government or sovereignty, be it tribal or state.

5. Squire v. Capoeman, 351 U.S. 1, 100 L ed 883 (1956), Does Not Preclude Application Of The Taxes In The Instant Causes.

In this brief, we have placed great reliance upon *Oklahoma Tax Com. v. United States*, 139 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Com.*, 334 U.S. 717, 92 L ed 1676 (1948). By reason of a Court of Claims' decision (*Mason v. United States*, June 16, 1972, appended to the Brief of Amicus Estate of Rose Mason, filed in McClanahan) the question arises as to whether this reliance is misplaced. For the Court of Claims held that *Squire v. Capoeman, supra*, has overruled at least *West*, if not both cases.

Note first that *Squire v. Capoeman* starts with two basic principles which are central to our whole brief:

> "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. * * *" (351 U.S. at 6)

Thus, the tax exemption found in *Squire v. Capoe-*

man rested upon a specific congressional enactment, *i.e.*, section 6 of the General Allotment Act, 25 USC 349. In applying this provision, this Court stated:

> "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." (351 U.S. at 8)

And the court in *Squire v. Capoeman*, *supra*, went on to hold where timber on the allotment is converted to money through sale of that timber, the exemption applies to the proceeds of the sale, so as to preclude a federal capital gains tax.

This holding does indeed cast doubt on one of the grounds of *West*, *i.e.*, it casts doubt on the proposition that a tax, such as inheritance tax (or a capital gains tax as in *Squire*) may be valid as applied to trust property even though its direct effect is to diminish the corpus of the trust.

However, we do not rely, in the instant cases, on this aspect of *West*. In none of the instant cases is the tax involved either imposed upon or measured by trust property or the proceeds from the conversion thereof into money.

In essence, *Squire* held that Congress did not intend to take away with one hand, through the capital gains tax, a tax exemption which it had granted with the other hand, through section 6 of the General Allotment Act. In the instant cases, in contrast, we can find no congressional enactment which grants any applicable tax exemption in the first place.

CONCLUSION

The above cited cases collectively stand for the proposition that general nondiscriminatory taxes imposed on individual Indian citizens as residents and citizens of the state and United States are applicable if not expressly forbidden by congressional enactment. No exemptions are implied. Here, the Indians have sought to engage in general business activities or employment within the state. There is no reason to place them on a different economic footing than any other resident citizen of their respective states as to these business activities. The question of whether or not they are "competent" or "incompetent" pertains solely to their relationship with their interests individually or collectively in land set aside for their benefit. It does not remove them as individuals from the general jurisdiction of a state for the imposition of general nondiscriminatory taxes which reach all residents and citizens alike.

It should be further noted that these tax cases upholding the state's power to impose the taxes here in question are in accord with this Court's basic principles recently announced in *Kake v. Egan*, *supra*, and *Williams v. Lee*, *supra*, that the states are free to tax where the state action does not interfere with reservation self-government. To tax the Indians in the instant cases does not any more interfere with their exercise of the right of self-government than does the state taxation of a judge's salary interfere with the right of the United States to govern itself. *Graves v. New York*, *supra*, 306 U.S. 466, 83 L ed 927 (1939).

The argument of the appellants and *amici curiae* for the appellants in these cases in effect isolates the Indians and the Indian communities from the rest of the United States. In substance, their argument is a return (1) to the sovereign-nation concept of *Worcester v. Georgia, supra*, which has been repudiated, and (2) to the assumption that the federal government has preempted all powers, duties and responsibilities not exercised by the Indians themselves. The history of adjudications by this court, the progression of the law on the subject of Indian affairs, and the general application of governmental immunity forcefully preclude any rule today of isolation of Indians. Further, the pattern of federal legislation in dealing with Indian questions has been to protect the Indian in his dependent status and at the same time to relieve him from that dependency by making him a responsible citizen of the state, community and nation in which he lives. This includes duties, responsibilities and privileges concerning the whole gamut of governmental affairs, including state taxation.

In closing, it should be observed that the states of Washington, New Mexico and Arizona and the Multistate Tax Commission are as much concerned about the plight of the Indian as is the United States. The businesses and the individual income here sought to be taxed would not be a reality were it not for the substantial commerce between Indians, on the one hand and non-Indian residents of the states of Washington, Arizona, and New Mexico on the other hand. It is not believed that this court will countenance, as

being in accord with its former decisions, a policy that undermines the Indians' state tax responsibility for the business activities they conduct and the income they earn within the respective jurisdictions of the states.

Respectfully submitted,

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IN THE

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UNITED STATES

OCTOBER TERM, 1971

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

STATUTES INVOLVED

Appellees cannot accept the appellant's statement of "Constitutional Provisions, Statutes and Regulations Involved." (App. Br. 5-7)

The only statutes, regulations and constitutional provisions involved in this appeal are:

1. Public Law 83-280 (67 Stat. 588 (1953), 18 USC § 1162; 28 USC § 1360) (hereinafter referred to as PL 83-280), set out on pages A-8 through A-12 of the appellant's

brief, which authorizes assumption by the states of criminal and civil jurisdiction over causes of action to which Indians are a party which arises on Indian reservations.

2. Sections 37.12.010 and 37.12.021 of the Revised Code of Washington (RCW), pursuant to which Washington assumed full criminal and civil jurisdiction over the Colville Confederated Tribes as authorized by PL 83-280. (Appendix A, p. 67.)
3. Chapter 82.24 RCW, the Washington Cigarette Tax Act, §§ 82.24.030 (Appendix B, p. 68), 82.24.050 (App. Br. A-28), 82.24-.110 (App. Br. A-29), the enforcement of which has given rise to the controversy in question.
4. Chapter 82.32 RCW, general administrative excise tax provisions, §§ 82.32.030 (App. Br. A-30) and 82.32.290 (App. Br. A-33).
5. United States Constitution, Art. I, § 8, Cl. 2, which provides in pertinent part:

   "The congress shall have power * * * "* * *

   "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; "* * *"
6. 25 USC §§ 261-264 (19 Stat. 200, 1876), the Indian Traders Act (App. Br. A-1 and A-2).
7. 25 CFR § 251 *et seq.* (1965), the Bureau of Indian Affairs' regulations concerning Indian traders (Appendix C, p. 70).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Appellees do not accept the appellant's statement of questions presented.

Appellees submit that the question presented is:

Did the state of Washington, in assuming civil and criminal jurisdiction over the Colville Indian Tribe and its members, to the full extent authorized by PL 83-280 and RCW 37.12.021 and in accordance with the Colville Business Council Resolution 1965-4 and the governor's proclamation assuming jurisdiction over the Colville Tribe of January 29, 1965, remove any existing impediment which might otherwise preclude the state of Washington from enforcing its cigarette tax laws against the appellant in conducting a retail cigarette business on his restricted land on the Colville Tribe reservation?

STATEMENT OF THE CASE

Appellees cannot accept the appellant's statement of the case. The material set forth in Appendices A, B and C to appellant's brief is not a part of the record in this cause. The Colville Tobacco Ordinance (App. Br. A-23 through A-28), Washington Laws 1972, 2nd Ex. Sess., chapter 157 (App. Br. A-34 through A-43), are not properly before the court. In addition, the letters set forth on pages 3-5 of the Single Appendix were submitted to the supreme court of Washington at the time of argument and were never introduced in evidence. Except for the pleadings and admissions of counsel, the evidence in this cause consists of three exhibits (R. 94-112, 113, 114) and the testimony of the appellant (Single App. 27-40). Thus, a major portion of the appellant's

statement of the case and argument concerns matters not a part of the record in this cause.[1]

Appellant, a full blood Colville Indian, owns allotted Indian land which he acquired by restricted deed from successors to the original allottee (Ex. 1, R. 96-112), on which he conducts his retail business. This land on which his business is located is in the city of East Omak, Washington, and on the Colville Indian Reservation in Eastern Washington. Of course, he is a citizen of the United States and a citizen and resident of Washington.[2] Were it not for the restrictions in the deeds of this property pertaining to encumbrances, alienation and taxation, there would be no way to distinguish this property from any other property in the city of East Omak and the county of Okanogan, Washington. Deeds to this land were conformed to Washington law descriptions and filed with the Okanogan County Auditor, Okanogan County, Washington (Ex. 1, R. 96-112).

The record does not show whether appellant lives on or off the reservation. Admittedly, at least

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[1]Furthermore, the briefs of amici curiae filed on behalf of appellant are replete with references to alleged facts and circumstances which are not a part of the record in this cause.

[2]As of June 2, 1924 (43 Stat. 253), all Indians were given United States citizenship status. The substance of the original act now appears as 8 USC § 1401, which declares:

"(a) The following shall be nationals and citizens of the United States at birth:

"* * *

"(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe; * * *"

This statute, coupled with Clause 1 of the 14th Amendment to the United States Constitution, made them citizens of the state within which they reside. *Re Heff*, 197 U.S. 489 (1905) at 504.

one-half of the Colville Tribe live off the reservation (App. Br. 8).[3]

Appellant's business is mainly that of selling cigarettes. He sells approximately 400 cartons each day. The tax on the 400 cartons of cigarettes would have been $440, which amounts to a loss of at least $13,200 per month in taxes to the state of Washington as a result of appellant's operations. His customers are Indians and non-Indians, but the majority are non-Indians (Single App. 41).

The appellant has operated without a license required by RCW 19.91.120, and has not registered with the state of Washington as required by RCW 82.32.030. Furthermore, he has not complied with the requirements of RCW 82.24.050, which imposes on the cigarette retailer the duty of affixing stamps to cigarettes sold at retail (Single App. 41). Appellant's retail business has not been regulated in any manner by any agency of the United States (Single App. 52).

In February, 1967, agents of the Washington State Department of Revenue entered the appellant's store and seized cigarettes which he had in stock (Single App. 42). They placed him under arrest and charged him with the crimes of (1) engaging in business without a valid registration certificate, as

[3]A fact sheet prepared by the Bureau of Indian Affairs which accompanied the Senate Report on S. 282 of the 90th Congress discloses that 75% of the Colville Tribe live off the reservation. (Hearing befor the Subcommittee on Indian Affairs of the Committee on Interior and Indian Affairs, House of Representatives, 90th Congress, Second Session on H.R. 3051, p. 52.)

required by RCW 82.32.030 and RCW 82.32.290; (2) engaging in the sale of cigarettes without a valid license to do so, as required by RCW 19.91.120; (3) having cigarettes in his possession without proper stamps affixed thereon, as required by RCW 82.24-.050; and (4) selling cigarettes without the proper stamps affixed thereto, as required by RCW 82.24-.050 (Single App. 7, 15).

After the information was filed against the appellant, he filed a complaint for a declaratory judgment (Single App. 6-13, 42). In his complaint he declared that he was and had been in the business of selling cigarettes without affixing the stamps required by state law. He further declared that it was his intention in the future to expand his mercantile operation and sell other items of merchandise, including but not limited to items of wearing apparel and appliances. He further alleged that it was his intention not to collect the tax imposed by statute upon sales in the state of Washington. He also declared his intention to become a vendor of liquor by the bottle, but later abandoned this declaration (Single App. 6-12, 42).

On January 30, 1965, the Colville Business Council issued its Resolution 1965-4 requesting that the governor of the state of Washington assume full and complete civil and criminal jurisdiction over the Colville Tribe, its members and the lands held in trust for it and its members (Single App. 23). Specifically, Resolution 1965-4 requested the following:

"IT IS HEREBY REQUESTED that the Governor of the State of Washington, in compliance with the aforesaid law, duly and regularly issue his proclamation to the effect that the State of Washington take full and complete jurisdiction over the Colville Confederated Tribes of the State of Washington, their territory, reservation, country and lands *to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state;* save and except as hereinabove provided." (Emphasis supplied). (Ex. 1, R. 95)[1]

This request was granted in a proclamation issued by the governor of the state of Washington on January 29, 1965 (Single App. 23, 46).

The action of the Colville Business Council and the governor concerning the assumption of jurisdiction by the state of Washington over the Colville Tribes was done pursuant to PL 83-280 and RCW 37.12.021. Based on this assumption of jurisdiction, the Washington supreme court found (1) that the state had jurisdiction to impose its laws of general application on the Colville tribal reservation subject to the exceptions enumerated in PL 83-280, and (2) that appellant's business activities do not fall among the exceptions (Single App. 21, 54).

The appellant appealed from this judgment.

ARGUMENT

Introduction

The controversy in this cause is limited to determining whether or not the appellant can sell ciga-

[1]The phrase "except as hereinabove provided" refers to game regulations (Ex. 1, R. 94).

rettes to persons not members of the Colville Tribe from his business location on the Colville Reservation free of any cigarette tax liability imposed on him as a retailer pursuant to applicable provisions of the state of Washington Cigarette Tax Act (chapter 82.24 RCW). RCW 82.24.050 imposes on a cigarette retailer the duty of fixing the state of Washington's cigarette tax stamps prior to the sale of cigarettes. This provision excepts from taxation cigarettes sold to qualified purchasers by federal instrumentalities and Indian tribal organizations. "Qualified purchasers," as used therein, has been determined by the Washington State Department of Revenue to include sales to enrolled members of a recognized Indian tribe when the sales are made within the exterior boundaries of the reservation occupied by the tribe. Cf. RCW 82.24.040. We are thus here concerned solely with the enforcement of the Washington cigarette tax against the appellant to the extent that he sells cigarettes to persons other than Colville Indians. We are not concerned otherwise with the appellant's business.

Because a substantial amount of the territory of the state of Washington is "Indian country" and because "Indian country" is next to or commingled with large population centers, tax-free sales of cigarettes by Indians to the general public pose a problem of significant magnitude to the state of Washington. The state of Washington's ability to effectively en-

force its cigarette tax law lies at the heart of this controversy.[6]

We are concerned with a class of retail activity which is not a subject of regulation under the Indian Traders Act (25 USC § 261, *et seq.*, 19 Stat. 200, 1876), or with the class of sales before this court in *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965).

This case also is not concerned with the application of PL 83-280 to a subject matter over which the United States Congress has specifically legislated. The underlying question in this cause is whether an

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[6]The following cases are pending pertaining to the question of whether or not Indians on or near the Puyallup Reservation, which is located near Tacoma, Washington, may sell cigarettes and other tobacco products without complying with the revenue laws of the state of Washington imposed on such selilng activities:

(a) *Jack Moses, Puyallup Tribe v. Kinnear*, United States Court of Appeals, Ninth Circuit, Docket Nos. 71-2605 and 71-2672.

(b) *Corwin King v. State*, Superior Court of Thurston County, Washington, Cause No. 45357.

(c) *Satiacum, et al. v. Kinnear, et al.*, U.S. District Court for the Western District of Washington, Southern Division, Cause No. 22-71C3.

(d) *Department of Revenue v. Moses, et al.*, Superior Court of Pierce County, Washington, Cause No. 260490.

In an effort to enforce its cigarette tax act and prevent widespread sales of cigarettes by Indians free of its cigarette tax, the Washington legislature amended the Washington Cigarette Tax Act in 1972 by requiring the tax to be paid on the first importation into the state and requiring that an importer be deemed to receive possession of the cigarettes for cigarette tax purposes when cigarettes being transported to Washington destinations and markets first cross Washington state lines. See Chapter 157, Laws of 1972, 2nd Ex. Sess. The Yakima Tribe, which has not ceded complete jurisdiction under PL 83-280, has challenged an assessment of $613,783.99 (including penalties and interest) for cigarette purchases by the Yakima Tribe for the months of March and April, 1972. (The Yakima reservation in which these cigarettes are sold to the public is near Yakima, Washington.) The validity of this assessment is now pending before the Washington Board of Tax Appeals as Docket No. 72-13. In support of the 1972 cigarette tax legislation, the Washington Department of Revenue's Research Division estimated Indians' cigarette tax sales accounted for a loss of $5.7 million per year to the state of Washington.

exemption from the Washington cigarette tax can be implied in light of PL 83-280.

As will be developed in the argument portion of this brief, it is the appellees' position that:

1. PL 83-280 encompasses a specific grant of tax jurisdiction to the states, subject to only the exceptions set forth therein and any other federal legislation which expressly limits a state's taxing power. This argument is supported by examination of the specific language of PL 83-280, its history (Part 1 of the Argument), and by the cases which have referred to or interpreted and applied PL 83-280 (Part 3 of the Argument).

2. Even if PL 83-280 is construed to not expressly cover the subject of taxation, it removes any impediments to the extension of Washington's tax jurisdiction to Indians in Indian country subject to the exceptions contained in PL 83-280 and any other federal legislation which specifically prohibits state taxation (Part 2 of the Argument). Case law also supports this construction of PL 83-280 (Part 3 of the Argument).

3. There is no federal legislation which prohibits the imposition of the excise tax in question. The Indian Traders Act (25 USC §§ 261-264), and the Indian Reorganization Act (48 Stat. 984 (1934), 25 USC § 461 *et seq.*) relied upon by appellant are not in point for the reasons set forth in Part 4 of the Argument portion of this brief.

4. Without considering the effect of PL 83-280 on a state's taxing jurisdiction, the state of Washington can impose its general cigarette excise tax on appellant's retail cigarette sales activity in reference to the sales here involved, namely, sales of cigarettes to non-Colville Indians. Appellees contend that this result follows because of the lack of any federal prohibition and the inapplicability of any implied immunity (Part 5 of the Argument of Appellees).

Summary of Argument

As heretofore set forth, the state of Washington, in good faith and in conformity with the requirements of PL 83-280, and pursuant to the request of the Colville Tribes, has assumed full civil and criminal jurisdiction over the Colville Tribes, subject to the exceptions contained in PL 83-280. This assumption of jurisdiction removed any legal restriction which might prevent Washington from enforcing its cigarette tax act against appellant.

PL 83-280, by its express terms, pertains to federal-state relations. This includes both a territorial and a subject matter jurisdiction. In order to meet the admitted "law and order hiatus" on Indian reservations, this grant of jurisdiction requires the extension of a state's substantive laws to Indians on the reservation (see App. Br. 21). This is the clear import of the language of PL 83-280 construed as a harmonious w[illegible]e. The extension of state jurisdiction to civil and criminal causes of action cannot

logically be construed to involve only the jurisdiction of state courts.

PL 83-280, in addition to granting specific jurisdiction over "causes of action" specifically authorizes the extension of civil laws that are of general application to private persons or private property to Indians in Indian country (28 USC § 1360(a)), and leaves intact tribal ordinances or customs only to the extent "not inconsistent with applicable civil law of the state" (28 USC § 1360 (c)).

Under PL 83-280, the states are free to apply their general laws to Indians in Indian territory to the extent not in direct conflict with any federal statute. This legislation effected withdrawal of general federal jurisdiction and responsibility over Indians in Indian country and placed this responsibility squarely on the shoulders of the states which assumed jurisdiction according to its terms. A manifest purpose of PL 83-280 was to eliminate uncertainty of state jurisdiction over Indians in Indian country by eliminating many of the traditionally implied distinctions between the status of Indians and their reservations and the rest of the residents and territory of the states.

Extension of state laws of general application to Indians and their reservations includes extension of the obligations which result from these laws. One of the obligations is to pay state taxes on the conduct of general business activities to the extent not

specifically prohibited by PL 83-280 or some other federal statute. *Goudy v. Meath*, 203 U.S. 146 (1906).

Assuming, *arguendo*, as contended by the appellant and his amici curiae, that PL 83-280 is not concerned with the subject of taxation (which obviously is not the case, inasmuch as it specifically deals with this subject), the Cigarette Tax Act of the state of Washington is properly imposed on appellant's cigarette sales to persons not members of the Colville Tribe. This follows from the elementary proposition that the states have residual jurisdiction over Indian country and Indian affairs; and they can assert that jurisdiction in imposing taxes so long as imposition of the taxes is not expressly prohibited by overriding congressional policy. PL 83-280, if it accomplished no other purpose, removed any implied prohibition against the enforcement of state tax laws of general import against Indians on Indian reservations. It eliminates any tax-immunity argument based upon Indian tribal sovereignty, implied governmental immunity or federal preemption of jurisdiction over Indians on the reservation.

Any specific federal legislation, such as the Indian Traders Act, must be interpreted *in pari materia* with PL 83-280 and its scope limited to the specific subject matter there considered by Congress. The same is true with respect to exempt Indian property. Immunity from state taxation on PL 83-280 reservations cannot be implied from the Indian Traders Act since it is specifically addressed

to the *regulation* of traders with Indians and is not addressed to the question of state taxation of traders with Indians.

It is further appellees' position that apart from PL 83-280, Washington's cigarette tax is properly imposed upon appellant because (1) Washington has residual jurisdiction over Indians on Indian reservations, and (2) implied governmental immunity stemming from either tribal self-government or federal preemption has been narrowed by this court and no longer applies to strike down taxes that have an indirect or remote effect on a federal instrumentality or federal policy. The underlying rationale of this argument has been developed at some length in the Multistate Tax Commission's amicus curiae brief filed in this cause and in the causes of *Mescalero Apache Tribe v. Franklin Jones, et al.*, U.S. Supreme Court Docket No. 71-738, and *McClanahan v. Arizona State Tax Commission*, U.S. Supreme Court Docket No. 71-834. It is dealt with herein within the more limited context of this cause in Part 5 of the Argument.

1. **PL 83-280 Specifically Granted the State of Washington Jurisdiction to Impose And Enforce its Cigarette Tax Act Against an Indian Retailing Cigarettes to Non-Indians From a Business Located on an Indian Reservation.**

The supreme court of Washington, sitting *en banc*, by an opinion filed September 2, 1971, carefully analyzed the significance and operative effect

of the language of PL 83-280, and concluded that it authorized the state of Washington to extend the operation of its civil laws, including its tax laws, to Indians on Indian reservations except as specifically prohibited by its terms (Single App. 41-54). This conclusion of the Washington supreme court is specifically supported by the history and express provisions of PL 83-280.

PL 83-280 added a new section 1162 to Title 18 USC and a new section 1360 to Title 28 USC, pertaining to criminal and civil jurisdiction over Indians in Indian country.

> 18 USC § 1162 granted enumerated states:
> "* * * jurisdiction over offenses committed by or against Indians in the area of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the state * * *"

Section 1162 further provided as follows:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive

> any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Subsection (a) of 28 USC § 1360 granted jurisdiction over civil causes of action to the same extent that criminal jurisdiction was provided for in § 1162, and further provided:

> "* * * those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State * * *"

Subsection (b) of 28 USC § 1360 contained restrictions comparable to those in subsection (b) of 18 USC § 1162 in the following language:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

In addition, subsection (c) of 28 USC 1360 provided that:

> "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

In order to remove any legal impediment to the assumption of civil and criminal jurisdiction which might exist as a result of any Enabling Act for the admission of a state or which might otherwise exist, the Congress enacted §§ 6 and 7 of PL 83-280. In accordance with this consent, the state of Washington enacted RCW 37.12.021, which provides:

> "Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060." (RCW 37.12.060 except for addition of the word "tidelands" repeats the substance of 28 U.S.C. 1360 (b))

It is to be noted that though the consent of the tribe was not required by PL 83-280, the Washington legislature did not choose to exercise jurisdiction except by consent of the tribe.[6]

As heretofore indicated, the Colville Business Council requested the state to assume and Washington did assume full civil and criminal jurisdiction over the Colville Tribes and their land "to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state."

In enacting PL 83-280, the Congress was careful to reserve jurisdiction in areas of special concern to it. This included: (1) the protection of real or personal restricted or trust property, including water rights, from alienation, encumbrance or taxation by the states; (2) the freeing of the use of such property from any state regulation which is inconsistent with any federal treaty, agreement or statute, or with any federal regulation made pursuant thereto; (3) the protection of the Indians with respect to their hunting, trapping and fishing rights; and (4) the continuation of tribal self-government to the extent not inconsistent with any generally applicable civil law of the state.

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[6]A similar requirement was enacted by Congress when it amended § 7 of Public Law 83-280 by Public Law 98-284 (Title 4, § 401, April 11, 1968, 82 Stat. 78, now in 25 USC § 1321 (1968)). Before this amendment Washington did assume jurisdiction over eight specific subject matters dealing with the relationship of state laws of a public nature to private individual Indians in all established reservations (RCW 37.12.010, Appendix A, p. 67). *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), discussed this section and held that Washington could assume partial jurisdiction under PL 83-280 as it did under RCW 37.12.010.

From the express language of PL 83-280, it is clear that the Congress removed Indian activities on the reservation from its general jurisdiction, and placed these activities under the general jurisdiction of the states. Except in the areas expressly reserved in the act, or otherwise expressly reserved by Congress, Congress intended that Indians be accorded the same status as other citizens and residents of a state, and ceded jurisdiction in conformity to this intent. This includes jurisdiction to impose general tax laws on activities or property not expressly prohibited by Congress, including the Washington Cigarette Tax Act.

The fact that Congress expressly legislated with regard to the subject of taxation and Indian self-government in the enactment of PL 83-280 eliminates (1) the contention that these subjects were not part of the subject matter of PL 83-280, and (2) the argument that PL 83-280 was concerned solely with court jurisdiction and not the application of the substantive laws of the states.

If Congress did not intend that PL 83-280 pertain to a state's taxing laws, it would not have been necessary to enact the tax restrictions set forth in subsection (b) of 28 USC § 1360 and subsection (b) of 18 USC § 1162, *supra*.

Furthermore, if Congress had not intended that Indian sovereignty or self-government be subservient to state laws, it would not have been necessary for it to enact 28 USC § 1360(c), *supra*.

It is an anomaly, indeed, for the appellant to argue that the Colville Tribe has the right to tax appellant and his cigarette business and that the state of Washington has no right to impose such a tax. This simply turns the language of subsection (c) into its opposite.

This court, in the early case of *Goudy v. Meath*, 203 U.S. 146 (1906), *supra*, specifically held that the statutory subjection of an Indian to the civil and criminal laws of the state, coupled with a grant of citizenship, subjected the Indian to taxation like any other citizen and resident of a state. In the language of the court:

> "* * * That act, in addition to the grant of citizenship, provided that 'Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' Re Heff, 197 U.S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.
>
> "Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens,—that is, that no exemption exists by implication, but must be clearly manifested. * * *" (203 U.S. at 149.)
>
> "* * * and it is disregarding the act of Congress to hold that the Indian having property is not subject to taxation when he is subject to all the laws, civil and criminal, of the state." (203 U.S. at 150.)

As heretofore indicated, PL 83-280 in express terms provides that the civil laws of the state which are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the state. Thus *Goudy v. Meath*, *supra*, is direct precedent.

The legislative history of PL 83-280 supports the appellees' position that general state tax laws apply to Indians on Indian reservations unless specifically prohibited by Congress.

The House of Representatives and Senate Committee reports pertaining to PL 83-280 are summarized in the opinion of the Supreme Court of Washington in *Tonasket v. State*, 79 Wn. 2d; 607, 488 P. 2d 281 (1971). The court then noted:

> "In Senate Report No. 699, which repeats in substance House Report No. 848 on House Resolution 1063 (which became Public Law No. 83-280), the following statement regarding the act and certain companion legislation appears:
>
> > " 'Your Committee on Interior and Insular Affairs, through its Indian Affairs Subcommittee, and with the continuing cooperation of the Secretary of the Interior and the Indian Bureau, has, during this session, operated in five major areas of legislation affecting the Indians. This legislation, whether before the House or presently under committee consideration, has two coordinate aims: *First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termi-*

nation of the subjection of Indians to Federal laws applicable to Indians as such.'

U.S.C. Cong. & Admin. News 2409 (1953).

"The report drew attention to the fact that, owing to the lack of state jurisdiction to prosecute offenses and limitations upon the federal jurisdiction, as a practical matter enforcement of law within the reservation had been left largely to the Indian groups themselves, and that Indian tribes often are not sufficiently organized to preserve law and order on the reservation. The report said:

" '[C]onsequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.'

U.S. Cong. & Admin. News 2412 (1953).

"Upon the question of civil jurisdiction, the report stated:

" 'Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, *and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.*

" 'After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provisions for all affected States to come within its terms; that the attitude of the various States and the

> Indian groups within those States on the jurisdiction transfer questions should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State Laws.'
>
> U.S.C. Cong. & Admin. News 2412 (1953)." (Emphasis added.) (79 Wn. 2d at 613-614)

As stated by the district court of the Southern District of California:

> "It appears that the purpose of Congress in passing Public Law 280 was to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs. * * *" *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971) at 374.

The fact that the Congress was concerned with civil and criminal law and order problems does not detract from, but rather supports, the argument that the general assumption of jurisdiction by the the state included the assumption of the power of taxation of Indians on Indian reservations except as prohibited. The so-called "law and order hiatus" resulted from a gap between effective tribal self-government and existing federal legislation, and the questionable applicability of state laws to this gap because of the doctrines of implied governmental immunity, Indian tribal sovereignty and federal preemption. The hiatus could be logically resolved

only by clearly defining the role of the states concerning Indian matters.

Nor is there merit to the argument that a state's assumption of criminal and civil jurisdiction over causes of action between Indians on Indian reservations pertains only to court jurisdiction. The question was not a question of a forum, but rather a question of what substantive laws were to apply. Congress had apparently left many areas of civil and criminal jurisdiction to the tribes in areas where the tribes had no effective substantive laws. Obviously, the state courts, in assuming and asserting jurisdiction under PL 83-280, were to apply state substantive laws—not nonexistent federal or tribal laws. The broad grant of jurisdiction by PL 83-280 was intended to fill this gap.

This interpretation of PL 83-280 by reference to its express language and legislative history does not mean that Congress intended to abandon the Indians or that PL 83-280 is to be construed as a termination act or as impliedly repealing any other specific federal legislation concerning Indian affairs.

A fundamental error in appellant's argument and the arguments of his amici curiae pertaining to PL 83-280 is the assumption that the extension of general state taxes to Indians on Indian reservations terminates tribal self-government and federal legislation and policies concerning Indian affairs. Nothing could be further from the truth.

The extension of a state's general criminal and civil jurisdiction, including its tax jurisdiction, to Indians and Indian country is not per se destructive of either tribal self-government or any federal policy not specifically covered by PL 83-280. Colville tribal organization and federal policies concerning it still exist. PL 83-280 reserves intact by its very terms some federal policies, including those pertaining to the tax-exempt status of real and personal property. Further, it preserves intact tribal self-government to the extent not inconsistent with state laws of general application.

Traditionally, in the federal system, various levels of government have exercised the taxing power to the extent not prohibited by the government having the right to preempt the field. Furthermore, the existence of state general jurisdiction, including the taxing power, does not prevent Congress from legislating specifically in any manner that it sees fit concerning Indian affairs, including granting specific tax exemptions such as those preserved in PL 83-280 for trust and restricted property.

In summary, the language of PL 83-280, given its ordinary meaning and effect, and the history of PL 83-280 clearly establish that it encompasses the subject matter of taxation and that it permits the states which assume jurisdiction in accordance with its terms to apply their general tax laws to Indians on reservations. *Goudy v. Meath*, 203 U.S. 146 (1906), *supra*, specifically holds that the power of

the state to tax Indians on their reservations, unless specifically prohibited by Congress, is a natural consequence of Indians being subject to the civil and criminal jurisdiction of such state and of being citizens.

2. **Assuming, Arguendo, That PL 83-280 Does Not Affirmatively Grant the State of Washington Jurisdiction to Impose a Cigarette Tax on Appellant's Sales of Cigarettes to Non-Indians on the Colville Reservation, Appellant is Still Not Entitled to Make Such Sales Free of the Washington Cigarette Tax.**

In order to sustain the validity of the Washington cigarette tax as applied to appellant's sales to non-Indians, it is not necessary to view PL 83-280 as an affirmative grant of taxing jurisdiction. Even if the construction of PL 83-280 presented under the previous heading is incorrect, there still remains the ultimate question concerning its application, *i.e.*, whether an implied Indian immunity from state taxation exists after its passage as a result of either tribal self-government (sovereignty) or federal preemption. It is respectfully submitted that PL 83-280 needs only to remove the umbrella of implied tax immunity accorded Indians in Indian country because of their peculiar relationship with the United States to sustain the state taxing power in question. This PL 83-280 unquestionably does.

This court, in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) rightly noted that:

> "* * * even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. at 75.)

PL 83-280 by express terms preserves only local tribal law which is not inconsistent with state law. It also removes as a right granted or reserved to the federal government the subject matter of general criminal and civil jurisdiction of Indians on Indian reservations.

This federal withdrawal of any general criminal and civil jurisdiction of Indians on the reservations, and the express subrogation of local tribal law on the reservation to state civil laws, remove any barriers to the application of state tax laws to Indians on the reservations.

PL 83-280 precludes any arguments based upon the lack of general jurisdiction in the states over Indian affairs, since Congress has specifically granted this jurisdiction to the states by enactment of PL 83-280. In light of this specific grant of criminal and civil jurisdiction, PL 83-280 eliminates any tax-exemption argument based on federal preemption, apart from specific Congressional prohibitions such as those expressly preserved in PL 83-280. Exemptions from state taxes based on implied immunity of Indians or their reservations as federal instrumentalities are no longer applicable. Tribal sovereignty or self-government arguments advanced

to curtail state taxing power clearly have no merit after a state assumes PL 83-280 jurisdiction.

Thus, irrespective of whether or not PL 83-280 is considered to expressly encompass the subject matter of state taxation, the tax in question is properly imposed.

3. The Case Law Referring to or Interpreting PL 83-280 Supports The Appellees' Position in this Cause.

There is no hint in any of the referred-to cases that the language employed by Congress in PL 83-280 is not to be given literal effect or that PL 83-280 is not concerned with the substance (subject matter) of state criminal and civil laws.[7]

In *Williams v. Lee*, 358 U.S. 217 (1959), *supra*, this court commented on PL 83-280 in the following language:

> "* * * Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the edu-

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[7]While this court has not had before it a PL 83-280 case, it has referred to PL 83-280 in the following cases: *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Williams v. Lee*, 358 U.S. 217 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), *supra*; *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965), *supra*; *Kennerly v. Dist. Ct. of Montana*, 440 U.S. 423 (1971).

The following cases have specifically dealt with PL 83-280 questions: *Quinault Tribe of Indians v. Gallagher*, 368 F. 2d 648 (9th Cir. 1966), *supra*; *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971), *supra*; *Anderson v. Gladden*, 293 F. 2d 463 (9th Cir. 1961); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F. 2d 1184 (9th Cir. 1971); *Kills Crow v. United States*, 451 F. 2d 323 (8th Cir. 1971); *United States v. Burland*, 441 F. 2d 1199 (9th Cir. 1971).

> cational and economic status of the Indians permits the change without disadvantage to them. See H R Rep No. 848, 83d Cong, 1st Sess 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v Georgia had denied." (358 U.S. at 220-221.)

In *Kake v. Egan*, 369 U.S. 60 (1962), *supra*, in commenting on PL 83-280, this court noted:

> "In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat 588, 18 USC § 1162, 28 USC § 1360. * * * Thus Congress has to a substantial degree opened the doors of reservations to *state laws*, in marked contrast to what prevailed in the time of Chief Justice Marshall." (Emphasis added) (369 U.S. at 74.)

In *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), *supra*, the court considered PL 83-280 *in pari materia* with a termination statute. It held that the hunting and fishing rights reserved by treaty survive the Termination Act of 1954 concerning the Menominee Tribe because these rights were reserved in PL 83-280. Obviously, if PL 83-280 and the Termination Act did not pertain to the same subject matter, that is, the withdrawal of federal supervision over Indian affairs on Indian reservations and the application of general state laws to the reservation, it would not have been proper to construe them together.

In *United States v. Burland*, 441 F. 2d 1199 (9th Cir. 1971), *supra*, the Ninth Circuit held that an Indian defendant from a PL 83-280 reservation was properly prosecuted in a federal court for passing a forged check to a non-Indian while on a non-PL 83-280 Indian reservation. It based its decision on the fact that PL 83-280 substituted state jurisdiction for federal jurisdiction on a geographic and subject-matter basis rather than in terms of the individual Indians. The subject matter, of course, is the state's substantive laws as applied to Indians on Indian reservations to the extent jurisdiction is granted by PL 83-280.

The *Rincon Band of Mission Indians* case, *supra*, is direct precedent. In *Rincon*, the district court applied the criminal sanctions of the San Diego gambling ordinance on the basis of California's PL 83-280 jurisdiction to nullify a gambling ordinance enacted by the governing body of the Rincon Indian Reservation. In reaching this result, the court determined that (1) a local ordinance was a "law of the state" within the meaning of PL 83-280; (2) the county gambling ordinance was not an encumbrance on the land within the purview of PL 83-280; (3) the gambling ordinance was not inconsistent with federal statutes, regulations and policies concerning the use of the exempt property and thus not in violation of PL 83-280 restrictions; and (4) the gambling ordinance did not conflict with federal policy of Indian independence and economic self-sufficiency.

The court found that "laws of a state" within the context of PL 83-280 referred also to local ordinances. In this connection, it noted:

> "It appears that the purpose of Congress in passing Public Law 280 was to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs. * * *" (324 F. Supp. at 374.)
>
> "This subject of legislation [regulation of gambling] is one where state and local authorities together prescribe the standards operative in a particular area. It would be as unlawful and as destructive of the full and equal citizenship of Indian citizens to exempt them from local laws on gambling as it would be to deny them specific benefits of county laws solely because of their Indian status. * * *" (324 F. Supp. at 375.)

In pressing the encumbrance argument, counsel for the Mission Band argued "that the gambling ordinance on its face regulates the use of lands of the Rincon Reservation by prohibiting the operation of a card room." In meeting this argument, the court stated:

> "The use of the word encumbrance in series with 'alienation' and 'taxation' indicates that Congress intended by these three words to protect the Indian from himself and swindlers, to prevent the taking of his lands by artifice or by law. * * * Later in the same statute it is provided that nothing in the section 'shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto.' 18 U.S.C. §

1162(b). If all state laws regulating land use were made inapplicable by the earlier language describing encumbrances, then this language would be totally unneeded. In construing a statute, courts whenever possible avoid a construction which renders part of the statute superfluous. * * *" (324 F. Supp. at 376.)

"There is no doubt that the card room would generate certain revenues for plaintiff even if operations there did not reach the impressive proportions seen by the Sheriff in his vision of a 'little Las Vegas'; other activities classified as criminal conduct are even more lucrative. To take plaintiff's argument to its logical conclusion, it seems that the state could only prohibit Indians on trust lands from engaging in unprofitable criminal acts. * * *" (324 F. Supp. at 377.)

In resolving the question concerning the meaning of "any federal treaty, agreement, or statute or with any regulation made pursuant thereto" as used in 18 USC § 1162 (b), *supra*, the court first considered the applicability of an administrative regulation of the Secretary of the Interior which provided that none of the laws, ordinances or other regulations of a state or political subdivision which limit, zone or otherwise regulate the use of real or personal property shall apply to Indian trust lands unless the Secretary "in specific cases" adopts or makes applicable these laws to Indian trust lands. The Secretary had not done this in reference to San Diego County's gambling ordinance. In disposing of this regulation, the court held as follows:

"* * * As the court has decided that this gambling ordinance is not a law regulating the

> use of property, the administrative regulation by its terms is inapplicable to this controversy. "In addition this regulation is void insofar as it purports to enlarge or restrict the scope of jurisdiction afforded by Public Law 280. * * * For a state law to be unenforceable due to conflict, there must exist a conflict between it and a treaty, agreement, statute or a regulation made under the authority of one of these three types of laws. * * *" (324 F. Supp. at 378.)

In resolving the Indian independence and economic self-sufficiency argument based on 28 USC § 1360(c), *supra*, the court held:

> "* * * There is no doubt that a residual sovereignty remains in Indian tribes even in those states where Public Law 280 operates. There is nothing in policy or law, however, which indicates that this limited self government inhering in the Indian tribes may rise to challenge state law. * * *" (324 F. Supp. at 378.)

This case vividly illustrates the kind of hiatus which would result if PL 83-280 is not given application in accordance with its express terms.

Contrary to claims by appellant and his amici curiae, the PL 83-280 cases establish that PL 83-280 does not refer solely to court jurisdiction or solely to the subject matter of law and order. From the cases referred to in this section of the brief, it is clear that Congress intended the subject matter of state civil law, except as expressly restricted by Congress either in PL 83-280 or elsewhere, to extend to Indians on Indian reservations which are subject to PL 83-280.

4. No Specific Federal Legislation Grants Any Immunity From the Imposition of the Washington Cigarette Tax to the Appellant's Retail Cigarette Sales Here in Question.

As heretofore indicated, PL 83-280 negates any argument that the tax in question cannot be imposed on appellant by application of the doctrine of implied governmental immunity or federal preemption or tribal self-government. This follows from the fact that tribal laws are no longer effective to the extent inconsistent with general state laws and the federal government has removed itself from general supervision of Indian affairs on Indian reservations. Specific federal legislation, to the extent it would conflict with any state law, would take precedence. To our knowledge, the only specific federal legislation which could possibly be construed to have any bearing, however remote, is the Indian Traders Act; the exceptions set forth in PL 83-280; and the statutes pertaining to the general financial involvement of Congress in Indian affairs and more particularly the Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 USC § 461, *et seq.*) None of these statutes prohibit the application of state taxes to Indians on Indian reservations.

As already indicated, PL 83-280 preserves tax exemption only for restricted or trust property. The tax in question is not a tax on such property. *Sullivan v. United States*, 395 U.S. 169 (1969); *United States*

v. Detroit, 355 U.S. 466 (1958). It is a general excise tax on cigarette retailing.

Likewise, the Indian Reorganization Act contains no tax exemption provisions except those pertaining to lands or rights in land (for example, 25 USC § 465, *supra*). In fact, the Indian Reorganization Act was designed to remove the Indian and his land from any dependent and wardship relation with the United States while preserving tribal customs and laws. The significance of this legislation is discussed in the Multistate Tax Commission amicus brief filed in this, the *Mescalero* and *McClanahan* causes, *supra*, on pages 16-18, and need not be repeated. As there indicated, the loan fund (25 USC § 470) established by this Act was to further the federal policy of integrating the Indian into American economic life on *equal* footing. To this end, proprietary enterprises were required to be conducted "not inconsistent with the law" (25 USC § 477). Rather than tax immunity, these provisions imply that Indians, in conducting private proprietary businesses, would be subject to the same taxes as their competitors.

Neither is the Indian Traders Act applicable in this cause, for essentially two reasons. First, the activities of the appellant taxed by the state, i.e., the selling of cigarettes to non-Indians, is not within the provisions of the act and the regulatory system established thereunder. Second, even if these activities

be within the scope of the act and the regulatory system. PL 83-280 requires that the effect of the Indian Traders Act be limited to its express scope, i.e., trade regulation, and not be extended, by implication, to the area of state taxation.

The Indian Traders Act contains four sections (25 USC §§ 261-264). Its provisions with respect to traders with Indians are essentially the same as those at the time of its enactment in 1834 (4 Stat. 729), and serve the same purpose as those of the original act, i.e., protection of the Indians from unscrupulous merchants. It does not purport to regulate Indian-operated enterprises selling to a non-Indian public; indeed, its basic purpose is just the reverse, i.e., the regulation of enterprises operated by non-Indians selling to Indians. This becomes clear from a reading of the act.

The first section of this statute (25 USC § 261) provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be *sold to the Indians.*" (Emphasis added.)

The second section (25 USC § 262) provides:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do

so under such rules and regulations as the Commissioner of Indian Affairs may prescribe *for the protection of said Indians.*" (Emphasis added.)

The third section (25 USC § 263) provides:

"The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued."

The fourth section (25 USC § 264) provides in material part:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise *offered for sale to the Indians* or found in his possession, and shall moreover be liable to a penalty of $500: * * *" (Emphasis added.)

We note first that, at least until commencement of this litigation, the Commissioner of Indian Affairs had not exercised the power given by 25 USC § 261 to license any Indian traders in the state of Washington (Single App. 52, Note 4).* That is, he had not

*As stated in a footnote in the Memorandum for the United States as *Amicus Curiae* in support of probable jurisdiction at page 7: "Although not used in the State of Washington, these regulations are in use elsewhere and *serve to protect Indians* against unscrupulous merchants." (Emphasis added.)

even exercised his power over non-Indians selling to Indians.

Secondly, there is not even a suggestion in the Indian Traders Act that it applies to an Indian-operated enterprise selling to the non-Indian public. This conclusion, reached from an examination of the Indian Traders Act, is confirmed by an examination of the regulations adopted thereunder.

To avoid any conflict of interest, the regulations provide that no licenses are issued to persons employed in Indian affairs by the United States (25 CFR 251.5 and 252.4). Federal employees in Indian affairs are allowed to purchase Indian arts and crafts, but not for the purpose of engaging in commercial trade (25 CFR 251.5; cf. 25 USC § 68(a)). Arms and ammunition may not be sold to the Indians by traders except on permission of the federal government (25 CFR 251.8). 25 CFR 251.23 provides that credit given Indians will be at the trader's own risk. 25 CFR 251.24 prohibits traders from paying Indians in token, tickets, store orders or anything of that character. Most importantly, products sold to Indians by licensed traders are required to be good and merchantable, and prices must be fair and reasonable. To accomplish these ends, all business records relating to transactions with Indians must be submitted to the proper federal officials upon request (25 CFR 251.22).

Admittedly, the regulatory system includes certain types of purchases by a non-Indian from an In-

dian. See, e.g., 25 CFR 251.24, *supra*. However, such purchases, we suggest, are those which are made by licensed Indian traders who are engaged in both selling and purchasing activities or, as was undoubtedly the case in 1834, bartering activities. We further suggest that if purchases by the non-Indian public of cigarettes from the appellant are within the scope of the regulatory scheme, it necessarily follows that each individual purchaser must, prior to making a purchase from the appellant, obtain a license from the Bureau of Indian Affairs. For, if anything is beyond dispute with regard to the Indian Traders Act, it is that a non-Indian engaging in Indian trading must obtain such a license. Such a result would not be an entirely happy one for the appellant; for such a requirement would, if enforced by the Bureau of Indian Affairs, effectively shut his business with the non-Indian public completely down and thereby eliminate the tax avoidance which is the state's primary concern.

We would agree with the appellant that requiring each individual purchaser to obtain a license would be absurd; but this absurdity simply shows the basic weakness in the appellant's attempts to stretch the Indian Traders Act beyond its clear scope and his attempt to reverse its real purpose.

In short, there is absolutely nothing in either the Indian Traders Act or the regulations thereunder which in any way controls the activities of the appellant in selling cigarettes to the non-Indian public.

The Bureau of Indian Affairs has in no way attempted to regulate the appellant's cigarette-selling activities, and for good reason; there is no basis for so doing in either the act or the regulations adopted thereunder.

During the course of the present litigation (in February, 1972), the appellant did obtain an Indian trader's license from the Bureau of Indian Affairs (App. Br. 41). We can only speculate as to his reason for so doing. Perhaps the reason stems from the fact that the appellant makes some sales of cigarettes to Indians, and might thereby be required to have a license under the Indian Traders Act, as construed in *United States v. Parton*, 132 F.2d 886 (4th Cir. 1943). This case held that, contrary to what appears to be the position agreed to by the appellant and his amici curiae, a full blood Indian is required to have a license from the Bureau of Indian Affairs under the same conditions as a non-Indian. His sole preference is that he is not subject to the penalties of 25 USC § 264 if he does not have a license when he should have one.

A second, and perhaps more likely reason, is that by having a license the appellant hopes to "bootstrap" himself into the scope of *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965), *supra*, so far as his sales to non-Indians are concerned.

In distinguishing *Warren, supra,* from the present cause, the supreme court of Washington in *Tonasket v. State, supra,* rightly noted:

> " 'The facts of that case, [*Warren*] however, are so different in material aspects from the facts of this case that the law enunciated therein has no application here. There, the company upon which the tax was sought to be imposed had been licensed by the Commissioner of Indian Affairs to trade with the Indians. Here, the plaintiff holds no such license. Furthermore, admittedly, the bulk of his trade is with non-Indians. Thus, the state tax does not interfere with a federal licensing policy as it did in the Arizona case.' " (Single App. 51-52)

In further distinction of the *Warren Trading Post* case, *supra,* the supreme court of Washington noted that in *Warren,* Arizona was not required to assume any responsibilities concerning Indian affairs on reservations, while here, pursuant to PL 83-280, the opposite is true (Single App. 52-53).

The decision in the *Warren* case was limited to *licensed traders trading with Indians* on the Navajo reservation. We are here concerned with an Indian who was not a licensed trader and who was selling to non-Indians.

This court, in the *Warren* case, premised its decision in part on the proposition that to impose a tax on gross income on an Indian trader dealing with the Indians would place an additional burden on the Indian purchasers and:

> "* * * thereby disturb and disarrange the statutory plan Congress set up in order to

protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. * * *" (380 U.S. at 691.)

Thus, this court in *Warren* confirmed our basic point, *i.e.*, that the Indian Traders Act is intended to protect Indian purchasers, and has nothing to do with Indian-operated enterprises selling to the non-Indian public.

For the above reasons, there is no basis in law and fact for the appellant to rely on *Warren Trading Post v. Arizona Tax Com., supra.*

This is particularly true in light of the fact that the state of Washington has assumed general jurisdiction over Indian affairs pursuant to PL 83-280.*

For those states assuming jurisdiction under PL 83-280, the rationale of *Warren Trading Post* that the federal government has preempted the entire field of Indian affairs on Indian reservations is untenable. Since the Indian Traders Act deals with the *regulation* of trade, any exemption from state taxation must be implied from the complete preemption of Congress in the area of Indian commer-

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*In Note [2], in *Warren*, this court noted that:
"Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations. See Organized Village of Kake v Egan, 369 US 60, 72-75, 7 L ed 2d 573, 581-583, 82 S Ct 562; Williams v. Lee, 358 US 217, 219-221, 3 L ed 2d 251, 253, 254, 79 S Ct 269; * * * 18 USC § 1162 (1958 ed.) and 28 USC § 1360 (1958 ed.) (respectively granting certain States criminal and civil jurisdiction over offenses and causes of action involving Indians within specified Indian reservations.)" (380 U.S. at 688.)

cial activity on Indian reservations. We are not here concerned with the subject matter of the Indian Traders Act, namely, the regulation of trade with Indians, but with the subject of taxation, the exercise of which is on an entirely different constitutional footing from that of regulation.

It is a basic principle of constitutional law that the power to regulate commerce by either the federal or the state government does not automatically preclude taxation of that commerce by the other. This court, in *Northwestern States Portland Cement Co. v Minnesota*, 358 U.S. 450 (1959), upheld the imposition of a non-discriminatory properly apportioned state income tax on an exclusive interstate business on the premise that the imposition of the tax was not a regulation of interstate commerce which Congress had the exclusive power to regulate. If the tax were on the privilege of engaging in the commerce, it would be a regulation of the commerce and thus invalid. *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944).

In *Polish Nat. Alliance v. National Labor Rel. Bd.*, 322 U.S. 643 (1944), this court stated:

> "* * * Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, *federal regulation does not preclude state taxation and state taxation does not preclude federal regulation.* Compare, for example, Heisler v. Thomas Colliery Co., 260 US 245, 67 L ed 237, 43 S Ct

83, with Sunshine Anthracite Coal Co. v. Adkins, 310 US 381, 84 L ed 1263, 60 S Ct 907." (322 U.S. at 649.) (Emphasis added)

With this basic distinction between regulation and taxation in mind, both PL 83-280 and the Indian Traders Act can be harmonized, in accordance with the express terms of each. The Indian Traders Act continues in full force and effect within the area of its express scope. But PL 83-280 requires that the Indian Traders Act be confined to its express scope, and not be extended to strike down a state tax on an Indian reservation over which the state has complete jurisdiction pursuant to PL 83-280.

One further observation. Since there is no federal statute which expressly prohibits the imposition of the tax in question, or the Arizona gross income tax considered in the *Warren case, supra,* it is clear that *Warren* is premised, at least in part, on the doctrine of implied governmental immunity stemming from either the concept of tribal self-government or general federal preemption and regulation of Indian affairs on an Indian reservation. PL 83-280, as heretofore indicated, specifically requires that tribal laws inconsistent with general state laws be disregarded, and specifically removes Congress from the field of general preemption of Indian affairs on Indian reservations. PL 83-280 places the states in the position of assuming general jurisdiction. In light of PL 83-280, there is no basis

whatsoever for application of the doctrine of implied governmental immunity.

5. Apart from PL 83-280, Appellant is Not Entitled to The Tax Immunity Here Claimed Because No Immunity From Such Tax Can be Implied.

Appellant is not exempt from the tax in question even if we could assume that PL 83-280 has no bearing on the tax question at issue, i.e., even if PL 83-280 does not contain any affirmative grant of tax jurisdiction and does not remove from the arena of debate the application of the doctrine of implied governmental immunity based on federal preemption and tribal self-government. This follows because this doctrine is no longer applied by this court to grant immunity where the imposition of state taxes has only an indirect or remote effect on the government instrumentality claiming the immunity.

The current status of this doctrine as applied to Indians is set forth on pages 18-27 of the Brief of Amicus Curiae Multistate Tax Commission in this cause and the *Mescalero Apache Tribe* and *Rosalind McClanahan* causes *supra* (Docket Nos. 71-738, 71-834, 71-1031). As indicated therein, so-called implied governmental tax immunity is essentially the same in its application to the federal government, state government and Indian tribes. As appellees' amici curiae contend, the pattern of this court's decisions is to narrow the scope of implied tax immu-

nity primarily through abandonment of the former "economic burden" test.

Apart from PL 83-280, the doctrine of implied governmental immunity is not applicable because, in the absence of federal preemption, the states have a residual jurisdiction over Indians and Indian affairs on the reservation. *Kake v. Egan*, 369 U.S. 60 (1962), *supra*; *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); *State of New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McGowan*, 302 U.S. 535 (1938); *Williams v. Lee*, 358 U.S. 217 (1959), *supra*.

As stated in *State of New York ex rel. Ray v. Martin, supra*:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. 449, quoted with approval in *Kake v. Egan, supra*, 369 U.S. at 74.)

As more recently stated in *Kake v. Egan, supra*:

> "* * * By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. * * *" (369 U.S. at 72.)
>
> "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. * * *" (369 U.S. at 74.)
>
> "These decisions indicate that even on reservations state laws may be applied to Indians

> unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. at 75.)

The question of whether or not the tax in question, apart from PL 83-280, would interfere with reservation self-government or impair a right granted or reserved by federal law is to be answered by application of the implied tax immunity cases such as *Graves v. New York*, 306 U.S. 466 (1939); *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *Oklahoma Tax Com. v. Texas Co.*, 336 U.S. 342 (1949); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania*, 318 U.S. 261 (1943); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *United States v. Detroit*, 355 U.S. 466 (1958) *supra*; *New York v. United States*, 326 U.S. 572 (1946).

In *Helvering*, the court held that a lessee under an oil and gas lease of state school land is not entitled to immunity as a state instrumentality from federal taxation with respect to income derived from operations under the lease. In so holding, the court laid down the following tests:

> "* * * immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of

government. Regard must be had of substance and direct effects. * * *" (303 U.S. at 386)

In *Helvering*, the court further refined the test by stating:

"* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. * * *" (303 U.S. at 386-387)

This same test was applied in *Oklahoma Tax Com. v. Texas Co., supra*, to decide the question of the immunity of a lessee of mineral rights in allotted and restricted land from the payment of nondiscriminatory state gross production and state excise taxes on petroleum produced from such lands (336 U.S. at 343). In upholding the tax, the court noted the uniform pattern which had developed both in the area of state taxation and in the area of federal taxation:

"* * * this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one." (336 U.S. 352)

In *Oklahoma Tax Com. v. United States*, 319 U.S. 598 (1943), in upholding an Oklahoma estate tax against an Indian's estate, this court again affirmed *Helvering, supra*, and there noted:

> "* * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." (319 U.S. at 604)
>
> "* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." (319 U.S. at 608)
>
> "Recognizing that equality of privilege and and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York, 306 US 466, 83 L ed 927, 59 S Ct 595, 120 ALR 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 US 405, 82 L ed 1427, 58 S Ct 969, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 US 277, 83 L ed 1289, 59 S Ct 838, 122 ALR 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623, supra, repudiated former decisions seriously limiting state and federal power to tax. See also Metcalf v. Mitchell, 269 US 514, 70 L ed 384, 46 S Ct 172, and James v.

> Dravo Contracting Co. 302 US 134, 82 L ed 155, 58 S Ct 208, 114 ALR 318. The trend of these cases should not now be reversed." (319 U.S. 610)

These cases and other cases of equal import establish three important principles: First, that implied immunity of Indians from state taxation parallels implied immunity from federal taxation and each is determined by the same test; second, that a tax must have a substantial and direct interference with the functions of government (state, federal or tribal) in order to be invalidated under the doctrine of implied governmental immunity; and third, statutory implied immunity is subject to the same test as constitutional implied immunity.

This court noted in *Oklahoma Tax Com. v. United States*, 319 U.S. 598 (1943), *supra*, that:

> "This Court has repeatedly said that tax exemptions are not granted by implication. * * * It has applied that rule to taxing acts affecting Indians as to all others." (319 U.S. at 606.)

As otherwise stated in *Squire v. Capoeman*, 351 U.S. 1 (1956):

> "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. * * *" (351 U.S. at 6)

In *New York v. United States*, 326 U.S. 572 (1946), *supra*, this court refused to exempt the state

of New York from a federal tax imposed upon the sale of mineral waters when the state engaged in that business. It noted that such a tax does not curtail the business of the state government more than it does a like business of a private person, and that the activity taxed is such that its taxation does not unduly impair the state's functions of government. In the language of the court:

> "* * * But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. Cf. Springfield Gas & E Co. v. Springfield, 257 US 66, 66 L ed 131, 42 S Ct 24; University of Illinois v. United States, supra (289 US at 57, 77 L ed 1028, 53 S Ct 509): Puget Sound Power & L. Co. v. Seattle, 291 US 619, 78 L ed 1025, 54 S Ct 542. If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: 'You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy.' * * *" (326 U.S. at 582.)

Again, in applying the immunity tax exemption principles, this court upheld the imposition of a state income tax upon a competent Indian on his share of restricted mineral resources of the tribe, in *Leahy v.*

State Treasurer of Oklahoma, 297 U.S. 420 (1936). As there noted:

> "The facts are substantially the same as those presented in Choteau v. Burnet, supra, which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." (297 U.S. at 421)

In *Five Civilized Tribes v. Com'r of Int. Rev.*, 295 U.S. 418 (1935), the court declared valid an income tax on income derived from investment of surplus income from restricted lands of an incompetent Indian. In so holding, the court stated:

> "We find nothing in either [federal statutes concerning the exemption of the land] which expresses definite intent to exclude from taxation such income as that here involved. See Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 581, 72 L ed. 709, 714, 48 S. Ct. 333.
>
> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. [Citation omitted.] The taxpayer here is a citizen of the United States, and *wardship with limited power over his property does not, without more, render him immune from the common burden.*
>
> "Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 72 L ed. 709, 48 S. Ct. 333, supra, held that restricted land purchased for a full-blood Creek —ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely

because of the restrictions upon the Indian's power to alienate." (295 U.S. at 421) (Emphasis added.)

Applying these principles to the instant case, it is clear that the tax in question is validly imposed. Its imposition can have only an indirect or remote effect on any governmental operations or policies. It does not any more interfere with the right of Indian self-government or federal policies concerning financial aid to Indians than any of the other taxes held valid in the referred-to immunity cases, and particularly that of the federal tax on mineral waters involved in *New York v. United States, supra.*

In his sales of cigarettes to non-Indian purchasers, the appellant certainly stands in no closer relationship to a governmental function than did the state of New York in *New York v. United States, supra.* To imply immunity to an individual Indian under circumstances where it was denied a sovereign state is not supported by any authority or line of reasoning whatsoever. Appellant is a citizen and resident of the state of Washington. His business is located within the city limits of East Omak, Washington. He is not distinguishable in carrying on his business activities from any other resident or citizen of the state. The fact that he is a full-blood member of the Colville tribe and that he conducts his business on land he has received by restricted deeds from the United States does not imply any immunity from the excise tax law in question.

Inasmuch as the federal cigarette tax is imposed on the cigarettes sold by the Indians on Indian reservations and this tax apparently does not unconstitutionally impair any federal policy pertaining to Indian matters, there is no reason to suppose that imposition of the state tax would unconstitutionally impair any such policy. Equality between federal and state implied immunity requires the same results in imposition of both the federal and state cigarette excise taxes. Except as to the difference in rates, both have an identical effect on the profitability of appellant's cigarette sales activity.

6. Reply to The Argument of Appellant and his Amici Curiae.

Appellant initially argues that the sovereign powers of an Indian tribe to regulate commerce on its reservation and to levy taxes on such commerce may not be impaired by the state unless Congress has given its express consent (App. Br. 12, 16-19). This is an historical argument based on the concept that Indian tribes are sovereign nations, and has been expressly repudiated by decisions of this court and is specifically nullified by the provisions of PL 83-280. *Kake v. Egan*, 369 U.S. 60 (1962), *supra; Williams v. Lee*, 358 U.S. 217 (1959), *supra; State of New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), *supra.*

Secondly, the appellant argues that PL 83-280 was enacted by Congress for the limited purpose of

giving state jurisdiction over criminal and civil litigation arising on Indian reservations (App. Br. 12, 19-26). This argument is contrary to the express terms of PL 83-280 and is not in accord with any decision interpreting the scope and operative effect of this law (see, *supra*, pp. 28-34), or legislative history (see Senate Rept. No. 699, 83d Cong. 1st Sess., p. 6, quoted *supra* at p. 21-22).

It is evident the Congress intended that PL 83-280 subject Indians in Indian country to the subject matter of state civil laws and not merely court jurisdiction. It would make no sense to give state court jurisdiction without having the substantive laws over which that jurisdiction is exercised also applicable.

Thirdly, the appellant argues that Washington excise taxes do not apply on the Colville Indian Reservation since Congress has not specifically granted taxing power to the states (App. Br. 12, 27-38). This argument is premised on the proposition that PL 83-280 does not encompass the subject of taxation. This is not true. Congress had the subject of taxation well in mind in enacting PL 83-280; hence the exceptions to state tax jurisdiction expressed therein. Furthermore, as already indicated, an express grant of taxing power is not needed (see, *supra*, Section 2 at pp. 26-28 and Section 5 at pp. 45-54). All that is necessary for state taxing jurisdiction to be exercised on an Indian reservation over which the

state has assumed jurisdiction pursuant to PL 83-280 is the removal of the implied restrictions on the exercise of that jurisdiction stemming from federal preemption. This PL 83-280 clearly accomplishes. Furthermore, if PL 83-280 were not on the books, the residual jurisdiction of the state and the current limited application of the doctrine of implied governmental immunity would permit the state taxing power to extend to appellant in his sales of cigarettes to non-Indians.

Fourthly, appellant argues that the Washington court's decision would terminate Indian tribal organization, contrary to PL 83-280 which provides for continued tribal existence (App. Br. 29-38). This is a *non-sequitur* argument. The extension of state taxing powers pursuant to the authority granted or the restrictions removed by PL 83-280 does not terminate either tribal self-government or federal involvement in Indian affairs any more than the taxing power of the United States destroys self-government of the states or the taxing power of the states destroys self-government of their political subdivisions.

Appellant's fifth argument that Congress has exclusive jurisdiction of trading on the Colville Indian Reservation (App. Br. 38-41) is refuted not only by the language of PL 83-280 but also by the argument made in this brief that the Indian Traders Act has nothing to do with appellant or his business (*supra;* Section 4, pp. 34-45). Particularly, it has

nothing to do with appellant's sales of cigarettes to non-Indians, which is the subject matter of the controversy in this cause.

As a sixth proposition, appellant argues that the imposition of state excise taxes on Indian personal property is prohibited by PL 83-280 (App. Br. 42-47). This argument involves a misreading of the exception provisions contained in 18 USC § 1162(b) and 28 USC § 1360(b), *supra*. These subsections provide that PL 83-280 does not authorize the states to regulate the use of any trust or restrict personal property "in a manner inconsistent with any federal treaty, agreement or statute or with any regulation made pursuant thereto." Appellant points to no treaty, federal statute, agreement or regulation which prohibits the imposition of a general excise tax.

The fact that RCW 82.32.210 and RCW 82.32-.240 purport to put a lien on all of the taxpayer's property for unpaid tax liability does not invalidate the tax. *United States v. Alabama*, 313 U.S. 247 (1941); *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948). The validity of the imposition of a tax does not turn on whether or not all of the property of the taxpayer is available for enforcement of the tax by lien, attachment, execution, or otherwise.

Squire v. Capoeman, 351 U.S. 1 (1956), *supra*, and *United States v. Rickert*, 188 U.S. 432 (1903), do not stand for the proposition that a general busi-

ness excise tax imposed on the sale of cigarettes is a tax on restricted or trust property of an Indian. The tax exemption found in *Squire* rested upon a specific Congressional enactment, i.e., § 6 of the General Allotment Act, 25 USC § 349. The federal capital gains tax there involved was imposed upon the proceeds of the sale of the land.

United States v. Rickert, supra, is not in point or precedent here. The personal property involved in *Rickert* consisted of cattle, horses and other property of like character which had been issued to the Indians by the United States and which they were using upon their allotments. As to this property, the court stated:

> "* * * It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose." (188 U.S. at 443)

This case, decided in 1903, was decided at a time when this court broadly applied the so-called intergovernmental immunities from taxation. Today, the doctrine has been greatly narrowed. (See, *infra*, pp. 45-54 and the Amicus Brief of the Multistate Tax Commission, pp. 18-27.)

A seventh argument that appellant's cigarette sales should be exempt from the Washington cigarette tax because of the federal policy of promoting the economic welfare of the Indians is also without

merit. The governmental immunity cases no longer follow the "economic burden" test. Furthermore, this argument is contrary to the express language of PL 83-280. Stretched to its ultimate conclusion, the appellant's argument would immunize him from all state taxes as long as the United States government was interested in his welfare. In fact, it would defeat the avowed federal policy of integrating the Indians into the business community on an equal footing with the rest of the citizens and residents of the state.

As an eighth point, the appellant argues that application of the state excise tax in question violates the tribal sovereignty of the Colville Tribes (App. Br. 47-50). This argument is predicated on the erroneous assumptions (1) that PL 83-280 does not require that tribal laws give way to state laws where there is conflict, and (2) that the imposition of a tax on an Indian's business activity is destructive of tribal self-government.

We are here seeking to tax a private individual in his proprietary capacity. It is no more destructive of tribal self-government that the United States' tax imposed in the case of *New York v. United States*, 326 U.S. 572 (1946), *supra*, is destructive of the government of the state of New York. In our federal system, the taxing power is a concurrent power, exercised by various levels of government. The fact that the state cigarette tax is applicable to appellant

does not *per se* prohibit tribal taxation. Preservation of tribal self-government to the extent not inconsistent with state laws as provided for in PL 83-280 does not require that an individual Indian in his personal commercial enterprise be exempt from all state taxes.

Lastly, the appellant argues that Congressional acts and other Indian protections are not repealed or destroyed by implication (App. Br. 50-52). Appellees have not given PL 83-280 any such construction or application. Other federal legislation, however, must be considered in *pari materia* with PL 83-280 to determine the dividing line between the present scope of state responsibility and federal responsibility over Indians in Indian country. Certainly, the long-range objective of congress is to assimilate the Indian into the state and locality of which he is a resident and citizen, while at the same time permitting the Indian to preserve his culture to the extent he desires to do so.

Amici Curiae Brief of Federated Tribes of the Colville Reservation Washington, et al., contains the additional argument that PL 83-280 is an unconstitutional delegation of legislative authority if it transfers authority over "Indian commerce" to the states. This argument is without foundation. This court has held that the power of Congress to regulate commerce includes the power to delegate that power to the states. Contrary to appellant's argument, cases

such as *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), are in point. Congress's authority to regulate commerce among the Indian tribes is no different than Congress's authority to regulate interstate commerce. Both authorities appear in the same clause of the Constitution and are set forth in identical language. The exercise of the power of taxation is not a regulation of commerce unless it is imposed on the privilege of engaging in that commerce, or unduly burdens or discriminates against that commerce as compared to intrastate commerce. In any event, the appellant is not engaged in commerce with the Indian tribes. Appellant is engaged primarily in the commercial activity of selling cigarettes to non-Indians in violation of state law.

Amici curiae for the Colville Tribe, for reasons which are obscure, argue that the factual statement that federal legislation has left the state with no duties or responsibilities respecting the reservation Indians appearing in *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965), *supra*, at page 691 is in error as concerns the state of Washington. Amici curiae then point out that the state of Washington has extended various services to the Indians which are required as a matter of constitutional law. Appellees agree that Washington has furnished considerable services to the Colville Indian Tribe and other Washington tribes and will continue to do so. This simply follows from the fact that Indians are residents and citizens of the state of Washington and

their interests and activities are, to a large measure, commingled with that of the other residents and citizens. This commingling has given rise to the problem at hand. The fact that the Washington Indians enjoy all the rights and privileges which are enjoyed by citizens generally, supports appellees' argument that Indians should be subjected to general state laws, including those pertaining to taxation, particularly after the assumption of jurisdiction under PL 83-280.

Amici curiae for the Washington Indian Tribes by reference to documents in Appendices B, C and D of their brief, argue that the Colville Tribes have contracted to pay for certain local governmental services. This material is not a part of the record in this cause, and any argument pertaining to the same is wholly irrelevant and immaterial to the question here involved.

Amici curiae for these Washington tribes also argue that the state of Washington has never validly assumed jurisdiction over Indian reservations within the state under PL 83-280. This argument is not before the court and is otherwise without merit. *State v. Paul*, 53 Wn 2d 789, 337 P. 2d 33 (1959); *Makah Indian Tribe v. State*, 76 Wn 2d 485, 457 P. 2d 590 (1969), appeal dismissed 397 U.S. 316 (1970); *Quinault Tribe of Indians v. Gallagher*, 368 F. 2d 648 (9th Cir. 1966), *supra*, cert. den. 387 U.S. 907 (1967).

In the Brief for Amicus Curiae National Congress of American Indians, the arguments are made (1) that PL 83-280 creates uncertainty as to what tribal laws remain; and (2) that the reference in 28 USC § 1360(a) to civil laws does not include tax laws since it refers to civil laws of general application to private persons or private property.

In answer to the tribal law question, PL 83-280 preserves Indian tribal law to the extent not inconsistent with any applicable general civil laws of the state.

In answer to the argument concerning private persons or private property, if tax laws are not laws of general application to private persons or private property, it is difficult to see what laws have such application. The Cigarette Tax Act here in question imposes a liability on appellant as a private person in his conduct of a private retail cigarette business.

In the Brief of Native American Rights Fund as Amicus Curiae in Support of Appellant, it is argued that the Washington supreme court improperly construed PL 83-280 as conferring broad power on the state of Washington to terminate the federal regulation and supervision of Indian traders, and that PL 83-280 should not be construed as including the power to terminate previously existing federal Indian policies. While the supreme court of Washington's decision in this cause could be con-

strued to hold that federal legislation concerning Indian affairs was terminated by PL 83-280 subject to the exceptions contained therein, this construction of PL 83-280 is not necessary to sustain the tax in question. As set forth in this brief, PL 83-280, as a minimum, has removed the federal government from any general preemption and has permitted the application of state law unless in conflict with express federal legislation. It also eliminates any tax immunities which can be implied from tribal self-government. PL 83-280 thus removed any immunity implied from federal legislation such as the Indian Traders Act.

Imposition of the state tax in question does not conflict with any federal law such as the Indian Traders Act or the Indian Reorganization Act. State taxation is a concurrent power and can be exercised against private persons or agencies even though these private persons or agencies stand in a special relationship to the federal government as a result of particular federal policies toward them. If Congress wants to exempt appellant's sales from the Washington cigarette tax, it must do so by express legislation. After PL 83-280, no exemption can be implied.

CONCLUSION

The appellant is a citizen and resident of the state of Washington as well as a full blood Colville Indian conducting business on his restricted lands

on the Colville Reservation in the state of Washington. His business consists almost entirely of selling cigarettes at retail to non-Indians.

The state of Washington, in order to effectively enforce its Cigarette Tax Act within its territorial limits, sought to enforce its provisions against the appellant. The appellant resisted this effort and filed a declaratory complaint in this cause alleging that he is free from the imposition of the cigarette tax.

He claims immunity because he conducts his business on restricted lands owned by him on the Colville Reservation and because he is a full blood Indian and a member of the Colville Tribe. He points to no federal statute or treaty which specifically exempts him from the operation of the Washington cigarette excise tax.

Inasmuch as Washington has assumed general civil and criminal jurisdiction over the Colville Tribe pursuant to the authorization contained in PL 83-280, Washington concluded that it was entitled to enforce its cigarette tax law against appellant. The Indian Traders Act and the *Warren* case, *supra*, relied upon heavily by the appellant have no application since we are here concerned with a person not licensed or regulated by the Act's provisions and with the application of the Washington cigarette tax to sales to non-Indians. Furthermore, the state has assumed duties and responsibilities concerning the Colville Tribe and appellant under PL 83-280

which negate applicability of implied immunity based on federal *regulation* of Indian traders.

In order to prevail in this cause, appellant must find that the doctrine of implied governmental immunity extends to him and his commercial activities involving sales to non-Indians. Since no such immunity can be implied, particularly in light of the general jurisdiction granted the state of Washington under PL 83-280, the appellant has made no case for the reversal of the judgment of the supreme court of Washington. Therefore, it is respectfully submitted that this court affirm the judgment of the lower court.

Respectfully submitted,

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APPENDIX A

Chapter 37.12

INDIANS AND INDIAN LANDS—JURISDICTION

37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided fur-*

ther, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted. [1963 c 36 § 1; 1957 c 240 § 1.]

37.12.021 ————Resolution of request—Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12-.060. [1963 c 36 § 5.]

APPENDIX B

82.24.030 Stamps to be affixed—Meter machines authorized. In order to enforce collection of the tax hereby levied, the tax commission shall design and

have printed stamps of such size and denominations as may be determined by the commission, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the commission to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided*, That where it is established to the satisfaction of the commission that it is impractical to affix such stamps to the smallest container or package, the commission may authorize the affixing of stamps of appropriate denomination to a large container or package.

The commission may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto. [1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

APPENDIX C

REGULATIONS OF THE BUREAU OF INDIAN AFFAIRS

Title 25

§ 251.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.
(R.S. 2132; 25 U. S. C. 263)

§ 251.5 Government employees not to trade with Indians except in certain cases.

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person

employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided*, That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further*, That employees in Alaska may in each case make such purchases with

the approval of the Secretary of the Interior where the amount involved exceeds $250, and with the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States employees, Indian blood.* Indian employees of the United States Government, of whatever degree of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative association, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Gov-

ernment must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ..., ...
(Name) (Title)

swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U. S. C. 68a, 87a, 441)

§ 251.8 Regulating sale of arms and ammunition.

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of

articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

INTEREST OF AMICUS

Appellant and Appellees have filed with the Clerk of this Court a written Stipulation consenting to the filing of this Brief. Amicus is a Yurok Indian who owns and runs a small grocery store overlooking the confluence of the Klamath and Trinity Rivers in Northern California. The store has been located for thirty years on a parcel of tribal land held in trust by the United States for the benefit of the tribe. Because of the remoteness of the area, the store serves as a primary source of grocery supplies for much of the Indian population living along the neighboring Klamath and Trinity Rivers in places such as Weitchpec and Pecwan. The store is a crucial source of credit frequently required by local residents as a result of chronic unemployment in the area. It also serves as a place of employment for a few and a telephone communications center for many.

Amicus has historically operated the store at a marginal profit level free of state and county taxation. In 1968, in reliance upon Public Law 280, the County of Humboldt attempted to levy a state personal property tax on amicus' store inventory. On August 30, 1970, the County filed a lawsuit to collect taxes, but on August 28, 1972, the Humboldt County Superior Court ordered the action dismissed in a decision appended hereto. (Appendix A) Because California is a P.L. 280 state, the decision in the case presently before this Court will inevitably affect Amicus and his customers.

ARGUMENT

This case is of crucial significance to Indian people residing within the jurisdictional boundaries of states mentioned in P.L. 280. If allowed to stand as written, the decision could presage the demise of tribal government in P.L. 280 states. P.L. 280 affects six states, Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin as well as Montana and Washington which claim some degree of jurisdiction under P.L. 280. 1970 Census reports indicate a total of 827,091 Native Americans (including non-Indian Alaskan Natives) residing within the entire country. The eight states listed above have a Native American population of 265,248, or almost one-third of the whole. U.S. Department of the Interior, Bureau of Indian Affairs, Statistics Division, Preliminary 1970 Census Counts of American Indians and Alaskan Natives (March, 1971) (Appendix C). Some of the 265,248 persons live on non-P.L. 280 reservations and some live outside Indian country but an undeniably large percentage of Native Americans remain affected.

Appellant's and other amicus briefs mirror the intricacy of the numerous legal issues involved. Amicus, in this Brief, will limit his discussion to one issue - whether the limitations contained within the language of P.L. 280 prevent the extension of state jurisdiction to Appellant's activities under the facts of this case. For reasons that are not clear to Amicus, the Court below presumed that the jurisdictional limitations contained in P.L. 280 were not applicable. At an early point in its decision, the

Court below stated:

> [T]he question is whether there is any limitation upon that jurisdiction other than those limitations set forth in Public Law No. 83-280. 488 P.2d at 284.

In this one sentence the Court below evidently dismissed from its consideration the exceptions enacted by Congress as a limitation upon state jurisdiction. Amicus believes the jurisdictional limitations contained within P.L. 280 require far greater consideration.

This Court has recently recognized the caution with which Congress has always proceeded in extending state jurisdiction over Indian country. Kennerly v. District Court, 400 U.S. 423, fn. 1 (1971). Clearly, that caution is evidenced in the limitations placed upon the state jurisdiction extended by P.L. 280. The statute states in part:

> Nothing in this section... shall authorize regulation of the use of [trust] property in a manner inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto ...

This language must be interpreted in the interest of the Indian people. Squire v. Capoeman, 351 U.S. 1, 6-7 (1956), Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918), Choate v. Trapp, 224 U.S. 665, 675 (1912)[1], United States v. Celes-

1. In Choate the Court stated:

tine, 215 U.S. 278, 290 (1909), Red Bird v. United States, 203 U.S. 76, 94 (1906).

In the statutory language quoted above, Congress assured the Indian people affected that the federal guardianship of the use of trust land would be continued by providing that whenever federal law (whether through treaty, agreement, statue or regulation) regulated usage of trust property, inconsistent state regulations would not apply. See, Metlakatla Indian Community v. Egan, 369 U.S. 45, 56-57 (1962). It is accordingly essential for this Court to determine whether the jurisdictional limitation is applicable to the subject matter before it. Appellant clearly operates his business on trust property. To fall within the limitation therefore, Appellant need only be regulated by federal law with which the state excise laws are inconsistent. Both aspects of this question have been thoroughly discussed and authoritatively decided in Warren Trading Post v. Arizona State Commn., 380 U.S. 685 (1965).

Under Warren Trading Post, Title 25 U.S. Code §§261-62 and regulations pursuant thereto exclusively control the area of trade upon Indian Reservations. Consequently state taxation disturbs the statutory plan Congress set up. . . to protect Indians. . . ." Id at 691. The reasons for federal control and the corresponding difficulties created by state taxation are well described by the Hum-

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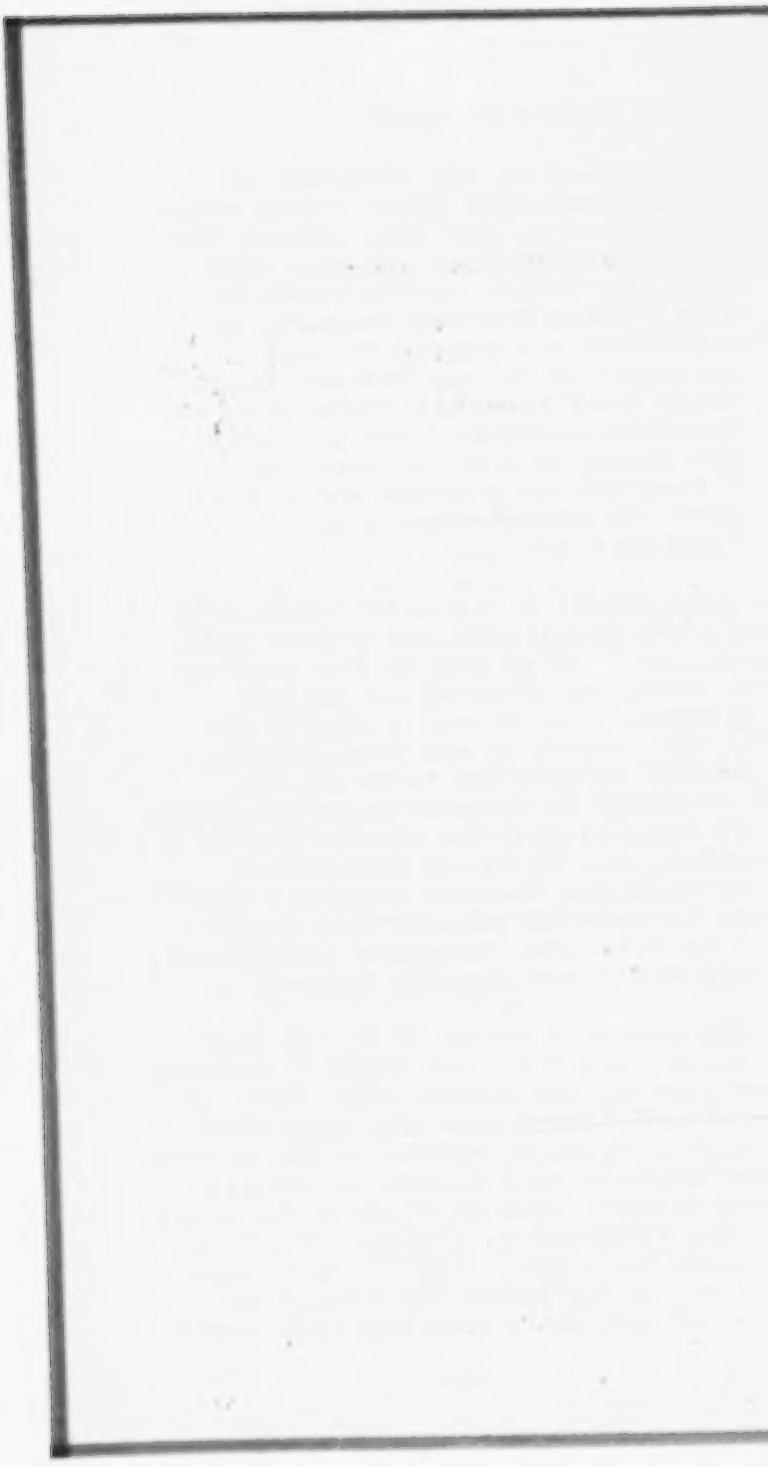
fn.1 continued
This rule of construction has been recognized without exception, for more than a hundred years, and has been applied in tax cases.

boldt County Superior Court:

> The Indians on the reservation are economically poor. They cannot afford to pay high prices for their merchandise. At the same time, an Indian on the reservation, using his own property to establish a business to sell merchandise to the Indian inhabitants must keep his costs down so that his customers can purchase his items at a price they can afford and at a price which will give the store owner a profit. (Appendix A)

State taxation of a business inevitably and unavoidably affects the prices that business must charge and/or the profits it will make. As decided in Warren Trading Post, this directly conflicts with federal statutes and regulations. Consequently in seeking to apply its excise statutes to transactions occurring on trust land within the boundaries of a Reservation, the State of Washington seeks to regulate the use of trust land contrary to federal statute and regulations. In P.L. 280, Congress guaranteed that this would not legally happen.

The decision below is based upon the premise that P.L. 280 repeals federal trading laws in the states affected. A number of considerations preclude this. The limiting language quoted above evinces a clear Congressional intent to retain existing federal laws applicable to trust land. See Kirkwood v. Arenas, 243 F.2d 863, 865-66 (9th Cir. 1957). Upon consideration, it is rather difficult to conceive of any other meaning that might

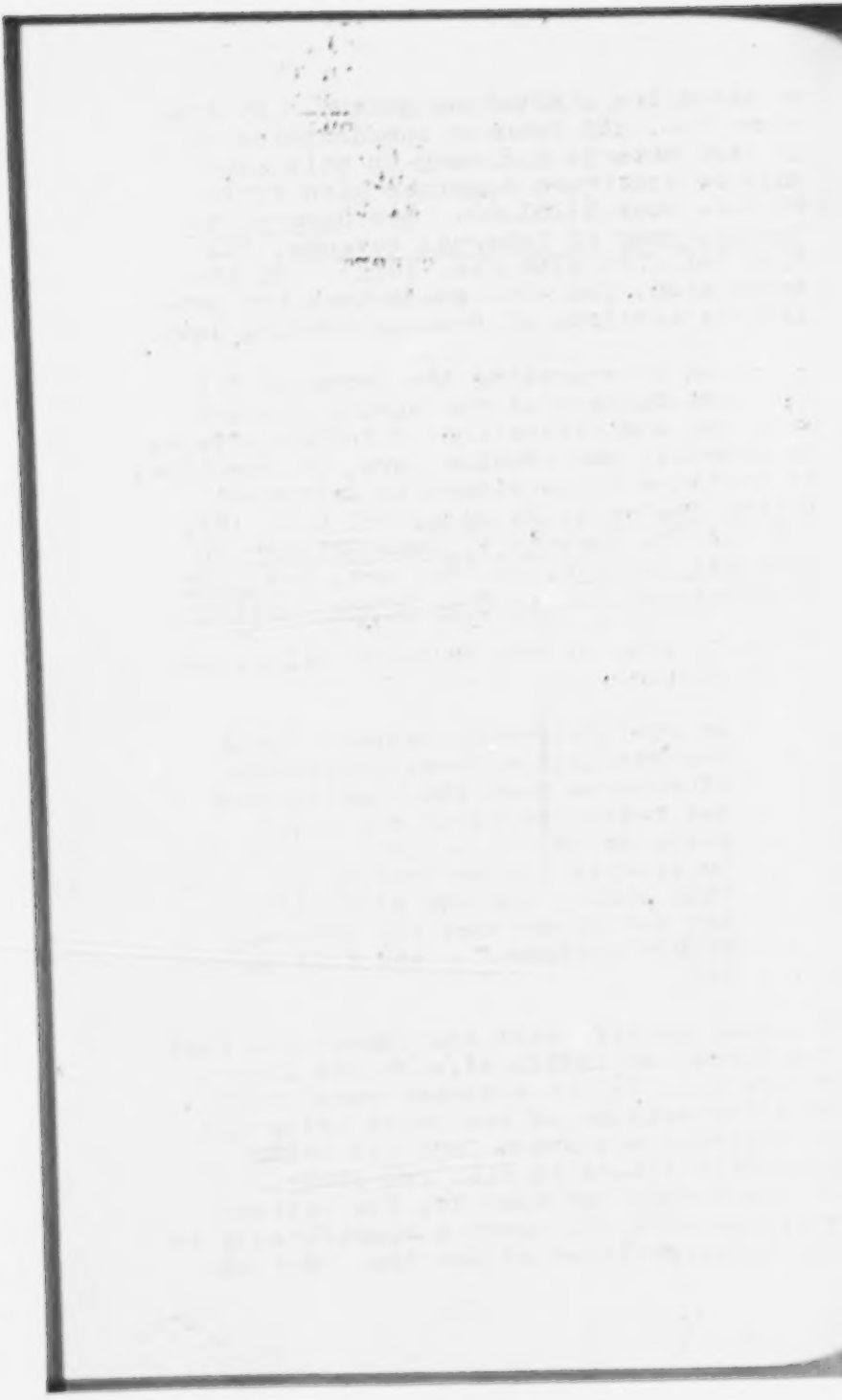


be given the limitation quoted. By its terms P.L. 280 invokes the doctrine of in pari materia and can, in this case, only be construed together with Title 25 U.S. Code §§261-62. See Stevens v. Commissioner of Internal Revenue, 452 F.2d 741, 744 (9th Cir. 1971). By its terms also, P.L. 280 guarantees the continuing vitality of federal trading laws.

In interpreting the terms of P.L. 280, the opinion of the agency charged with the administration of Indian affairs, in general, and trading laws, in specific, is entitled to considerable deference. United States v. Jackson, 280 U.S. 183, 193 (1930), Stevens v. Commissioner of Internal Revenue, at 746, see, Red Lion Broadcasting Co. v. Fed. Communications Comm., 395 U.S. 367, 381 (1969). In footnote four of the decision below, the Court stated:

> We are advised by counsel for the Washington State Department of Revenue that the Commissioner has never exercised the power given by 25 U.S.C. §261 (1876) to license Indian Traders in this state, and the plaintiff has not questioned the accuracy of his statement. 488 P.2d at 287.

A reader is left with the impression that the Bureau of Indian Affairs has interpreted P.L. 280 in a manner consistent with the opinion of the Court below and accordingly withdrawn from its trade responsibilities in P.L. 280 states. If the Bureau had done so, its action would necessarily carry a significance in the interpretation of the law. But the

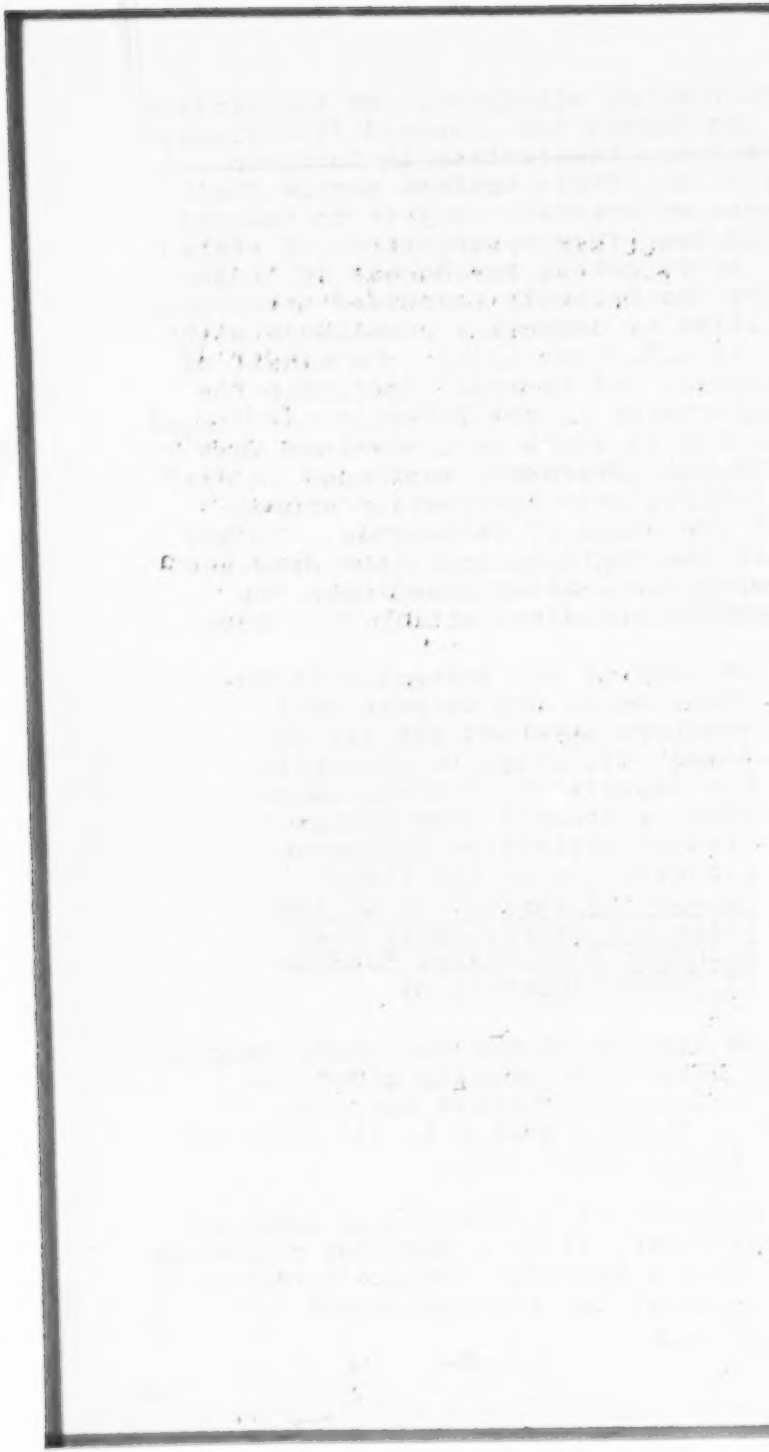


Bureau has not withdrawn. At the present time the Bureau has licensed five traders on the Hoopa Reservation in Northern California. These traders pursue their business enterprises subject to federal law and free from restrictions of state law. As to amicus the Bureau of Indian Affairs has recently exercised its responsibilities by demanding compliance with Title 18 U.S. Code §1161. On behalf of the Bureau, the Regional Solicitor for the Department of the Interior has issued an opinion in which he determined that the federal government continues to exercise control over Reservation stores within the State of California. In his opinion the Regional Solicitor drew the following conclusions based upon the limitations contained within P.L. 280:

> In view of the foregoing exception, we do not believe that Congress intended the Act of August 15, 1953, to authorize the imposition of state taxation or control over Indian trading activities on Indian reservations in the state. Opinion of the Office of the Solicitor in re: Santa Rosa Mother's Club, dated October 22, 1968 (Appendix B).

Both the clarity of the statutory language and the deference normally given the opinion of administrative agencies require a finding that P.L. 280 does not repeal Indian trade laws.

But even if Congressional language were not clear, it is a familiar principle of law that a specific statute controls over a general one without regard to



priority of enactment. Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961), Townsend v. Little, 109 U.S. 504, 512 (1883). Title 25 §§261-62 exclusively control the area of trade with Indians upon Indian Reservations; P.L. 280 nowhere specifically indicates an intention to alter that federal control. Accordingly federal control over trade is not altered.

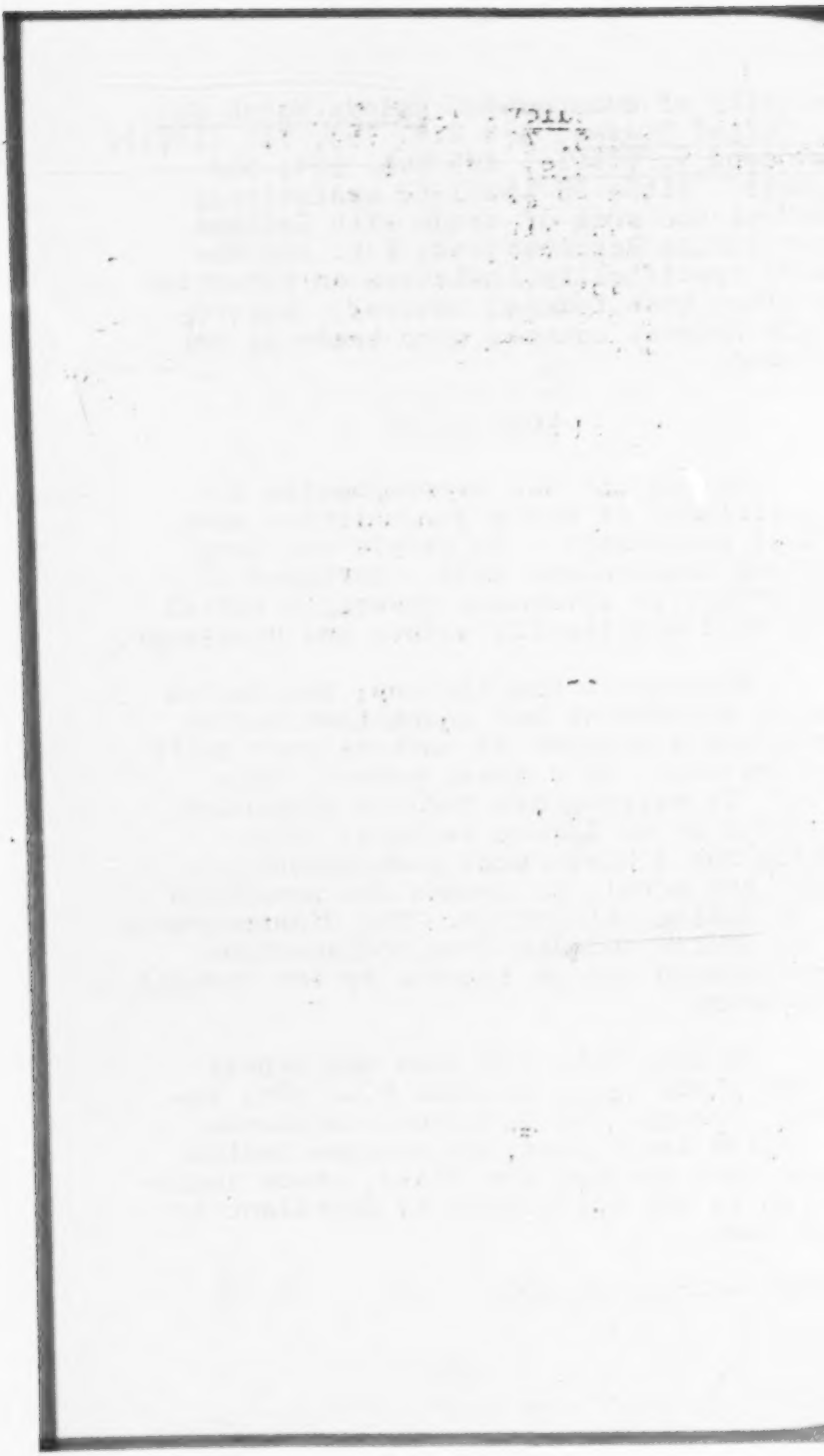
CONCLUSION

Amicus can not overemphasize the significance of state jurisdiction upon tribal government. No people can long perform meaningless acts. Stripped of any effective governing powers, a tribal body will necessarily wither and disappear.

Throughout its history, the United States Government has guaranteed Native Americans a measure of control over their own destiny. To a great extent, this power is responsible for the continued vitality of an Indian culture. This nation has a historical committment, legal and moral, to permit the retention of an Indian life style. The disappearance of an Indian culture from the American scene should not be imposed by the federal government.

Because P.L. 280 does not repeal Indian trade laws, because P.L. 280, instead, insures the continued existence of Indian trade laws and because Indian trade laws preempt the field, state legislation is not applicable to Appellant in this case.

DATED: October 2, 1972



Respectfully Submitted,

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Counsel for Amicus Curiae
Eric W. Pearson, Jr.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF HUMBOLDT

COUNTY OF HUMBOLDT, a political subdivision of the State of California,

Plaintiff,

vs.

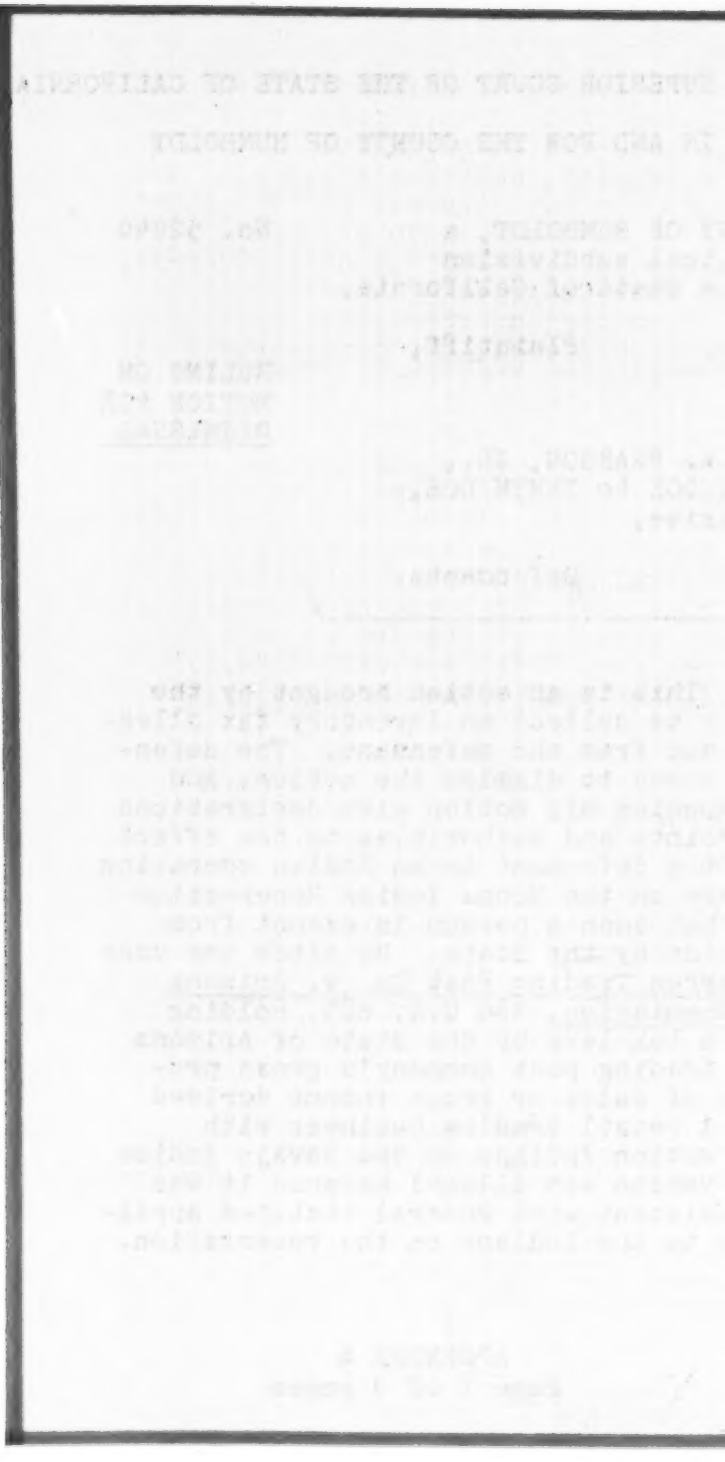
ERIC W. PEARSON, JR., FIRST DOE to TENTH DOE, inclusive,

Defendants.

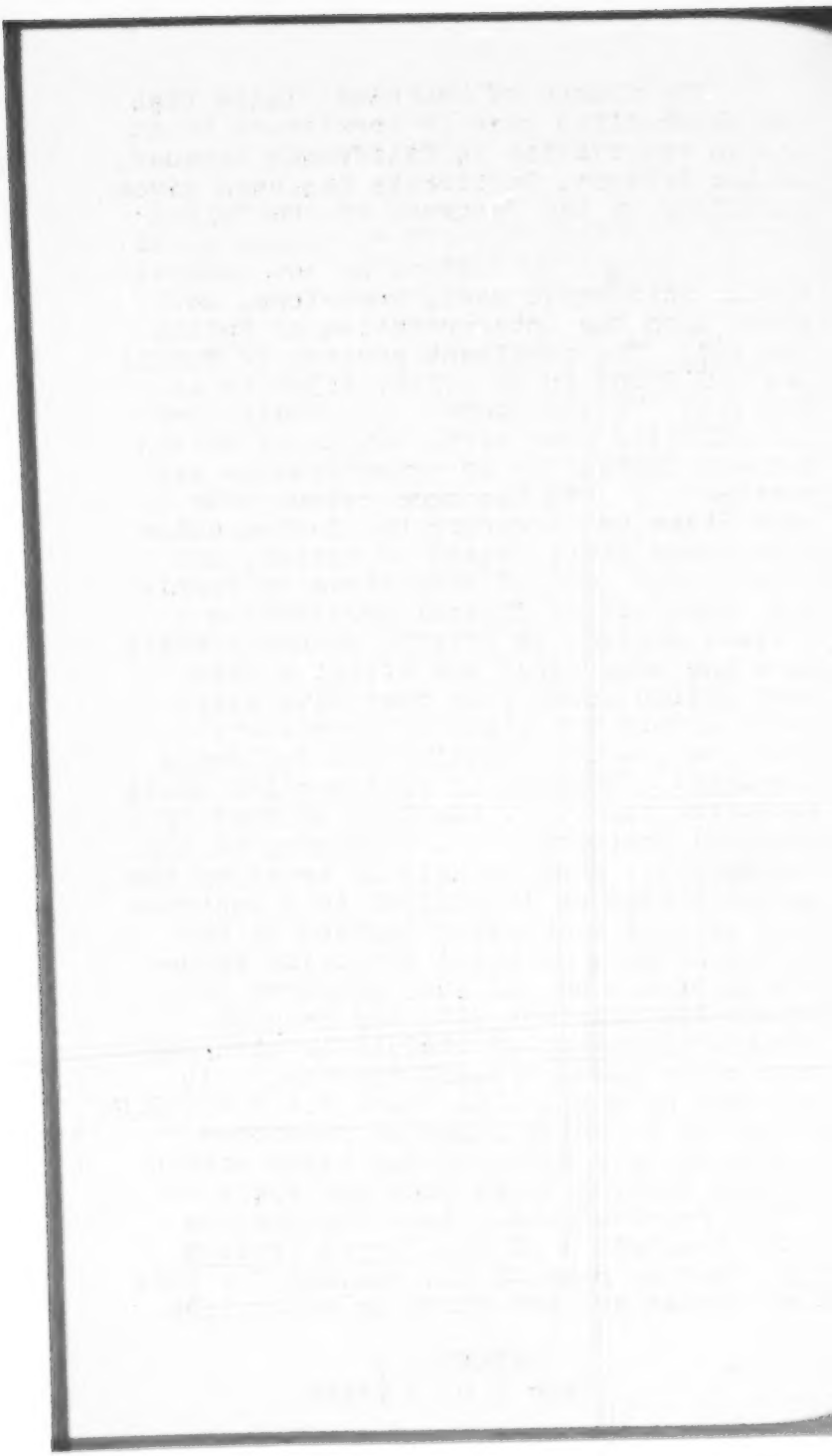
No. 52040

RULING ON MOTION FOR DISMISSAL

This is an action brought by the County to collect an inventory tax allegedly due from the defendant. The defendant moves to dismiss the action, and accompanies his motion with declarations and Points and Authorities to the effect that the defendant is an Indian operating a store on the Hoopa Indian Reservation and that such a person is exempt from taxation by the State. He cites the case of Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, holding that a tax levy by the State of Arizona on a trading post company's gross proceeds of sales or gross income derived from a retail trading business with reservation Indians on the Navajo Indian Reservation was illegal because it was inconsistent with Federal statutes applicable to the Indians on the reservation.

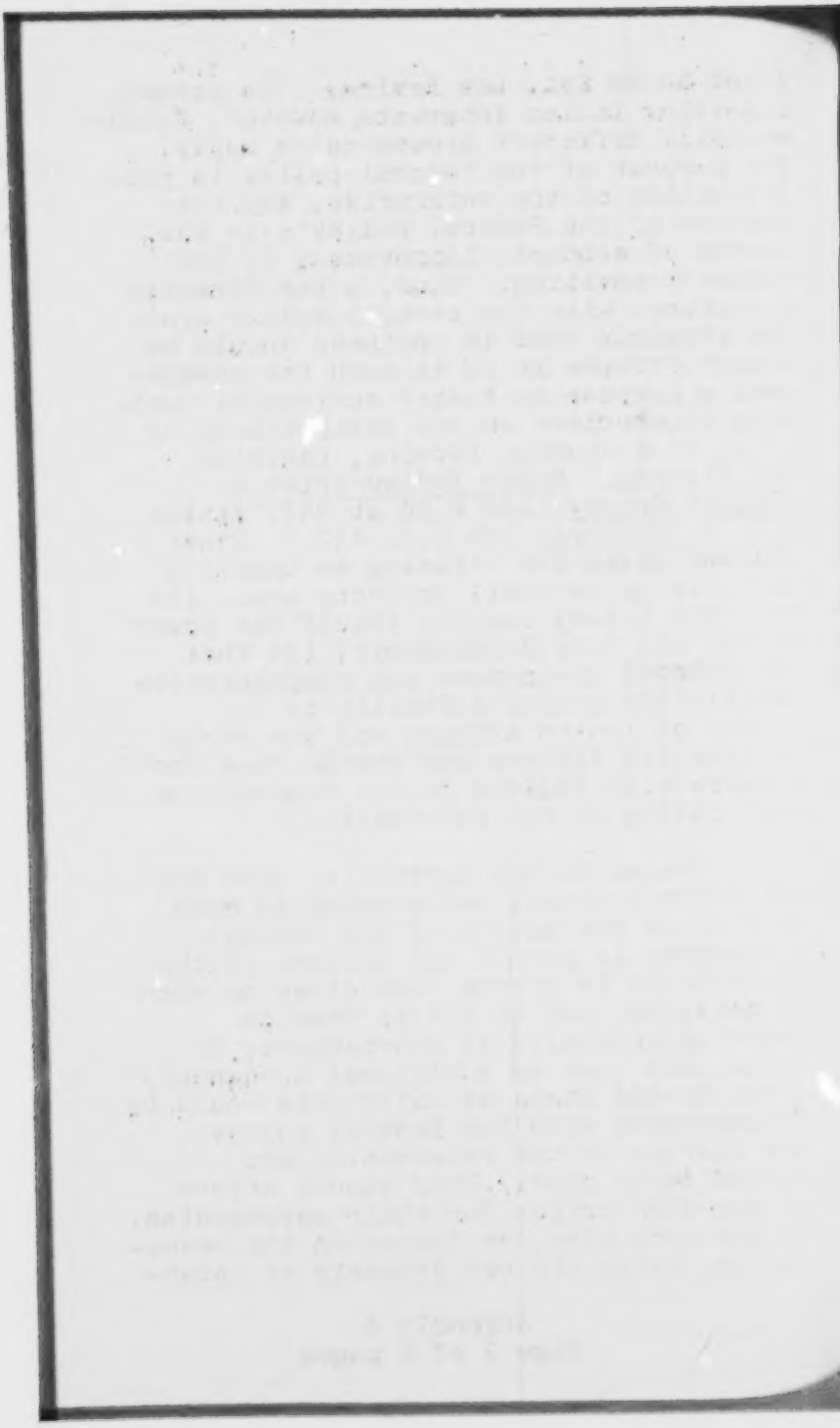


The County of Humboldt claims that the above-cited case is irrelevant to an Indian reservation in California because, unlike Arizona, California has been given authority by the Congress of the United States [illegible] Public Law 280 to impose a tax of this nature on Indians on the reservation. This whole case, therefore, depends upon the interpretation of Public Law 280. The pertinent portion of Public Law 280 found in 28 U.S.C. §1360 is as follows: "[t]he State . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties . . . to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:" Then the statute contains the following language: "Nothing in this section shall authorize the ... . taxation of real or personal property . . . belonging to any Indian . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto." It has been held that the "Buck Act," 4 U.S.C. §§105-110 in which Congress permitted states to levy sales or use taxes within certain Federal areas does not apply to Indian reservations. (See discussions under Headnote 4 of the Warren Trading Post case.) Some of the reasons for this distinction are set forth in an article



found in 59 Cal. Law Review: "In cases involving Indian interests, however, fundamentally different ground rules apply. The purpose of the Federal policy is profitability of the enterprise, and the measure of the Federal policy's is the degree of economic improvement in the Indian's position. Thus, a tax directly interferes with the central policy goal. . . the property used in business should be exempt because it is as much the government's purpose to foster successful business enterprises on the reservations as it is to encourage farming, ranching and fishing. Makah Indian Tribe v. Clallam County, 440 P.2d at 447, citing U.S. v. Rickert, 188 U.S. 432." Other reasons given for refusing to uphold a tax levy on personal property are: (1) that the tribal council itself has power to tax and levy assessments; (2) that the Federal government has comprehensive legislation giving authority to the Bureau of Indian Affairs and the right to regulate license and charge fees for traders with Indians on the reservation and trading on the reservation.

Coming to the particular case and the Hoopa Indians, and keeping in mind that it is the policy of the Federal government to permit the Indians on the reservation to govern themselves as much as possible, and to assist them in becoming economically independent, it would seem that an additional burden of a tax by the State of California would be inconsistent with the Federal policy. The Indians on the reservation are economically poor. They cannot afford to pay high prices for their merchandise. At the same time, an Indian on the reservation, using his own property to estab-



lish a business to sell merchandize to the Indian inhabitants must keep his costs down so that his customers can purchase his items at a price they can afford and at a price which will give the store owner a profit. The State cannot impose a sales tax on goods sold on the reservation to inhabitants of the reservation because this is said to interfere with fundamental Federal policy. There seems, therefore, to be no reason why a county can impose an inventory tax upon that same business.

IT WILL BE THE ORDER OF THIS COURT that this action be dismissed.

DATED: August 21, 1972

D. H. Wilkinson
Judge of the Superior Court

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Sacramento Region
2800 Cottage Way
Room E-2753
Sacramento, California 95825

October 22, 1968

Mr. Kenneth J. McManigal
Tax Counsel
State of California Board of Equalization
P.O. Box 1799
Sacramento, California 95808

Re: Santa Rosa Mothers' Club

Dear Mr. McManigal:

Reference is made to your inquiry of September 19, 1968, and our previous telephone conversations on the foregoing subject.

We understand that a group of Indian women plan to conduct barbecues and sell meals to Indians and non-Indians, apparently for charitable purposes, within the territorial limits of an Indian reservation. In this connection you have inquired as to the possible application of federal trading laws to the activities of this group while operating within a reservation.

Article 1, sec. 8, cl. 3, of the United States Constitution provides that, "Congress shall have power . . . to regulate commerce . . . with the Indian tribes." From our earliest dealings with the

Indians, Congress has exercised a dominant control over persons who wished to trade with Indians and Indian tribes. Under the Act of August 15, 1876, as amended (19 Stat. 176; 25 U.S.C. §§261-262), the sole power and authority in the appointment of traders to Indian tribes is vested in the Commissioner of Indian Affairs (Federal Indian Law, 1958, pp.373-381). The Commissioner has, in turn, promulgated comprehensive regulations to implement the licensing of traders under federal law, which are to be found in 25 CFR 251-252. These laws provide no specific exemption for Indians or Indian groups.

It has been held by the Solicitor for the Department of the Interior that because Congress has given exclusive authority to the Commissioner of Indian Affairs to regulate trade with the Indians on Indian reservations and the prices at which goods should be sold to the Indians, the field is closed to state action. (Solicitor's Opinion, 58 I.D. 562 (1943); see also 57 I.D. 124.)

In Warren Trading Post v. Arizona Tax Commission, et al., 380 U.S. 685 (1965), the State of Arizona attempted to levy a sales tax of 2% of the gross proceeds of sales or gross income of Warren Trading Post Company, a retail trading business operating on a portion of the Navajo Indian Reservation within Arizona. The business was operated by non-Indians and its consumers were both Indians and non-Indians. In that case, the Supreme Court of the United States took note of the federal laws relating to trading with Indians and stated as follows:

> "... These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders. ..."

The court also had occasion to review the prior opinions of the Solicitor's Office as cited above, and stated its concurrence with the correctness of those rulings. The court felt that the assessment and collection of the tax would to a substantial extent frustrate the evident Congressional purpose of ensuring that no burden be imposed upon Indian trading except as authorized by Congress.

Similarly, in striking down the imposition of a county ad valorem tax on personal property owned in part by an Indian on an Indian reservation in the State of Washington, the Supreme Court of that state ruled that imposition of such a tax would be inconsistent with existent federal policy, in that Congress had neither specifically nor impliedly provided for the taxation of Indian personalty by the state or its subdivisions. The court cited United States v. Rickert, 188 U.S. 432 (1903), and the Warren case, supra. See Makah Indian Tribe v. Clallam County, 440 P.2d 442 (1968).

We must, of course, recognize that certain state laws have been permitted to apply to activities on Indian reser-

vations, where such laws are specifically authorized by Congress and where they clearly do not interfere with federal policies concerning the reservations (see Organized Village of Kake v. Egan, 369 U.S. 60 (1961). The Act of August 15, 1953 (67 Stat. 588) extended, with certain exceptions, state civil and criminal jurisdiction in the areas of Indian country situated in California and other enumerated states. However, one of the stated exceptions to extension of state jurisdiction specifically forbids that law from "... authorizing the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to restriction against alienation imposed by the United States: ..." or authorizing "...regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto. ..."

In view of the foregoing exception, we do not believe that Congress intended the Act of August 15, 1953 to authorize the imposition of state taxation or control over Indian trading activities on Indian reservations in the state.

To sanction state taxation and controls over the operation of an Indian group on an Indian reservation could place an undue burden on reservation Indians and could in turn disturb and disarrange the statutory plan Congress set up for the very protection of its Indian wards.

Inasmuch as Indians are not specifically exempted from the application of

ederal laws and regulations with respect
o trading activities on Indian reser-
ations, it is our opinion that the
rading operations of an Indian group
hich operates within the confines of
n Indian reservation fall under the
xclusive jurisdiction of the Commissioner
f Indian Affairs.

Sincerely yours,

Charles R. Renda
Regional Solicitor
Sacramento Region

Barry K. Berkson
For the Regional Solicitor

c:
ssociate Solicitor, Indian Affairs
rea Director, Bureau of Indian Affairs
irector, Palm Springs Office, BIA
rea Field Representative, BIA, Riverside

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1031

LEONARD TONASKET, APPELLANT

v.

THE STATE OF WASHINGTON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (J.S. App. A) is reported at 79 Wash. 2d 607, 488 P. 2d 281. The opinion of the Washington Superior Court (J.S. App. B) is not reported.

JURISDICTION

On November 15, 1971, the Supreme Court of the State of Washington entered final judgment affirming the decision of the State Superior Court (J.S. App. C). Notice of appeal was filed on December 8, 1971 (J.S. App. D). Probable jurisdiction was noted on June 12, 1972. 407 U.S. 908. This Court's jurisdiction rests on 28 U.S.C. 1257(2).

QUESTION PRESENTED

The United States will discuss the following question:

Whether the assumption by the State of Washington of criminal and civil jurisdiction within the Colville Indian Reservation under Public Law 280 [1] authorizes the State to tax retail sales made on the reservation by a member of the Colville Tribe.

INTEREST OF THE UNITED STATES

By order of April 3, 1972, the Court invited the Solicitor General to express the views of the United States in this case. Because of its treaty and trust obligations to reservation Indians the United States is interested in protecting such Indians from diminutions, not expressly authorized by Congress, of their immunities from state taxation. The United States is also concerned that Public Law 280 be interpreted so as to effectuate its purpose.

STATEMENT

Appellant is a Colville Indian of full blood, who owns a store on allotted land held in trust by the United States in the Colville Indian Reservation in the State of Washington. His customers are Indian and non-Indian. App. p. 37.[2] In violation of state law, if it is applicable, appellant did not obtain a license

---

[1] Act of August 15, 1953, 67 Stat. 588, *et seq.*, 18 U.S.C. 1162, 28 U.S.C. 1360. The original Act is set forth at J.S. App. E, pp. 2–5. Public Law 280 was amended by the Indian Civil Rights Act of 1968, Act of April 11, 1968, Title IV, 82 Stat. 78, *et seq.*, 25 U.S.C. 1321, *et seq.*

[2] The statement by the Supreme Court of Washington that the "majority are non-Indians" (App. p. 41) does not seem to be supported by the record. Compare App. p. 37.

as a retailer of cigarettes nor affix state cigarette stamps to cigarettes he sold. In February 1967, agents of the State of Washington entered appellant's store, seized the cigarettes he had in stock and arrested him for violation of the state cigarette licensing and tax laws.[3] App. p. 42. Thereafter, appellant brought this suit for a declaratory judgment to establish his right to do business free of regulation or taxation by the State. The Supreme Court of the State of Washington, affirming the judgment of the trial court, held that the Colville Tribe, by submitting itself to the criminal and civil jurisdiction of the State of Washington as authorized by Public Law 280 and RCWA 37.12.021, subjected the Tribe and its members to state sales taxes and business regulations. App. pp. 24–25. Appellant appealed to this Court, which noted probable jurisdiction on June 12, 1972. 407 U.S. 908.

SUMMARY OF ARGUMENT

1. Public Law 280 did not change state powers of taxation within Indian reservations. It was enacted primarily to improve the administration of criminal and civil justice within certain Indian reservations by making state courts and state law enforcement available to the Indians who live there. In authorizing the application of state substantive law within these reservations, the Act provided broad exemptions assuring that Indian tax immunities and the trust status of Indian lands would remain unchanged and that federal statutes concerning the use of reservation land would remain in effect. The legislative history

[3] RCWA 19.91.120; RCWA 82.32.030; RCWA 82.24.050.

of the statute shows that Congress chose not to subsidize States which might choose to assume the jurisdiction provided by Public Law 280 by conferring new taxing powers or by direct subsidy. And the purpose of the statute would be frustrated by freighting a tribe's decision to make use of state courts and law enforcement with a tax consequence unintended by Congress.

2. Applying these principles to the present case, it follows that the State has no authority to tax appellant's sales to Indians. *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685. The question of the State's authority to tax appellant's sales to non-Indians is less clear. Moreover, since the decision below, Washington has enacted a new law permitting certain tax-free sales by Indians to non-Indians and the Colville Tribe has passed an ordinance reflecting that law. These changes in the applicable law may well affect the relief to be granted in this suit for a declaratory judgment.

ARGUMENT

I.

PUBLIC LAW 280 DOES NOT CHANGE STATE POWER TO TAX WITHIN INDIAN RESERVATIONS

1. Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 28 U.S.C. 1360, now 25 U.S.C. 1321–1326, is entitled "An Act to confer jurisdiction * * * [on certain States] with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States * * *." It provides that certain States shall have "jurisdiction over offenses committed by or

against Indians in * * * Indian country * * * to the same extent that such State has jurisdiction over offenses committed elsewhere within the State * * *." It further provides that "the criminal laws of such State shall have the same force and effect * * * as they have elsewhere within that State." As to civil jurisdiction, the Act provides that certain States shall have "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country [within such States] * * * to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within that State." 25 U.S.C. 1321(a); 1322(a). Each of these grants of jurisdiction, however, is followed by an extensive proviso prohibiting among other things the alienation or taxation of trust property whether real or personal or the regulation of such property in a manner inconsistent with any federal treaty, agreement, statute or regulation. 25 U.S.C. 1321(b); 1322(b). The Act also preserves the authority of tribal ordinances and customs "if not inconsistent with any *applicable* civil law of the State * * *." 25 U.S.C. 1322(c) (emphasis supplied). The Act is thus quite different from termination legislation which ends federal supervision over a tribe and terminates the benefit of federally provided tax exemptions. Compare 25 U.S.C. 891–902 (the Menominee Termination Act), especially 25 U.S.C. 898, 899. See also *Menominee Tribe* v. *United States,* 391 U.S. 404.

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The Act originally applied only within the States of California, Minnesota, Nebraska, Oregon and Wisconsin, but it permitted other States, by subsequent affirmative action, also to assume jurisdiction under its provisions. The consent of the Indians affected was not required. Public Law 280, Sections 6 and 7. See J.S. App. E, p. 5. In 1968, the Act was amended to provide that thereafter a State could assume the jurisdiction authorized by the Act only "with the consent of the * * * tribe occupying the particular Indian country" affected, in the form of a majority vote of the enrolled adult Indians affected. 82 Stat. 78, *et seq.*, 25 U.S.C. 1321(a), 1322(a), 1326.

The House Report on H.R. 1063, which became P.L. 280, speaks of the bill as part of a series of measures withdrawing federal responsibility for Indians (H. Rep. No. 848, 83d Cong., 1st Sess., p. 3; S. Rep. No. 699, 83d Cong., 1st Sess. p. 3),[4] but makes it clear that Public Law 280 itself is a more modest solution to a more specific problem, the inadequacy of law enforcement and of the adjudication of civil conflicts in some areas of Indian country (H. Rep., *supra*, p. 6):

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could

[4] The House Report was adopted by the Senate Committee as its report as well. References are to the House Report.

> best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.
>
> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.

That the Act was considered primarily an authorization of state court jurisdiction, and not an abolition of federal supervision of Indians or the ending of Indian tax immunities, is also suggested by this Court's reference to the Act in *Kennerly* v. *District Court of Montana*, 400 U.S. 423, as an "extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country" (*id.* at 427) and the Court's reference to the 1968 amendments as "a new regulatory scheme for the extension of state civil and criminal jurisdiction to litigation involving Indians arising in Indian country" (*id.* at 428).

Moreover, there is no indication in the committee reports or debates on the bill that Congress intended the Act's conferral of civil and criminal jurisdiction to extend the States' power to tax Indians, although if this were intended it would have been a matter of sufficient importance to evoke discussion within Congress and opposition from the tribes. To the contrary,

the Act's legislative history affirmatively shows that Congress intended not to subsidize the States for exercising criminal and civil jurisdiction within reservations, either by federal payment or by authorizing increased taxation of Indians. In the hearings before the House Subcommittee on Indian Affairs on June 29, 1953, the substitute bill which had been prepared by the Bureau of Indian Affairs and which became Public Law 280 was discussed by Mr. Sellery of the Bureau of Indian Affairs and Congressman Young of Nevada. After Congressman Young asked whether under the substitute bill the States would be subsidized, the following colloquy occurred.[5]

> Mr. Sellery. * * * Generally, the Department's views are that if we started on the processes of Federal financial assistance or subsidization of law enforcement activities among the Indians, it might turn out to be a rather costly program, and it is a problem which the States should deal with and accept without Federal financial assistance; otherwise there will be some tendency, the Department believes, for the Indian to be thought of and perhaps to think of himself because of the financial assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from

[5] The records of this hearing are in the National Archives and are not available without the approval of the House Committee on Interior and Insular Affairs. With the approval of the counsel of the Committee we are lodging a transcript of the pertinent part of the hearings with the Clerk and we are transmitting copies to the parties and *amici*.

other citizens of the State. And it is desired to give him and the other citizens of the State the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians.

Mr. Young. That would not quite be true, though; would it? Because for the most part he does not pay any taxes.

Mr. Sellery. No. There is that difference.

Mr. Young. A rather sizable difference in not paying for the courts or paying for the increased expenses for judicial proceedings.

Mr. Sellery. The Indians, of course, do pay other forms of taxes. I do not know how the courts of Nevada are supported financially, but the Indians do pay the sales tax and other taxes.

Mr. Young. But no income tax or corporation tax or profits tax. You understand a large portion of the land is held in trust and therefore is not subject to tax.

Mr. Sellery. That is correct.

Mr. Young. So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.

Mr. Sellery. I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States.

[Daily transcript of Hearing pp. 8–10].

The lack of compensation for States assuming the new jurisdiction was again referred to in the hearings before the full committee on July 15, 1953:

> Mr. Abbott. * * * The other states not included, such as Mr. Young's state, Nevada, have indicated unwillingness and they have good reasons, I believe * * *. [p. 7]
>
> * * * * * *
>
> Mr. Young. Mr. Chairman, did you say Nevada. I object to Nevada, because only 15 percent of our state is owned by the state and 85 percent is owned by the Federal Government.
>
> Mr. D'Ewart. All right, California, Minnesota, Nebraska, Oregon, and Wisconsin. Washington is also excluded. [p. 17]

Thus, the clear (though never precisely stated) premise for the Act's conferral of jurisdiction directly on certain named States whose representatives did not object, while authorizing optional assumption of jurisdiction by other States, was that no addition to state revenues would result from exercise of jurisdiction under the Act. This premise is partially reflected in the Act's provisions specifically assuring that Indian property tax immunities shall not be affected:[6]

> Section 2: (b) [25 U.S.C. 1321(b)] Nothing in this section shall authorize the alienation, encumbrance, *or taxation* of any real or per-

[6] Indian tax immunities result largely from the trust status of Indian land and treaties reserving such land. *Squire* v. *Capoeman*, 351 U.S. 1; *United States* v. *Rickert*, 188 U.S. 432; *The Kansas Indians*, 5 Wall. 737. They are to be liberally construed in favor of immunity and against implied repeal. *Choate* v. *Trapp*, 224 U.S. 665, 675.

sonal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof [emphasis added].

Section 4: (b) [25 U.S.C. 1322(b)] Nothing in this section shall authorize the alienation, encumbrance, *or taxation* of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; * * * [emphasis added].

While the Act thus specifically refers to property taxation (the most prominent, but not the only, area of Indian tax immunity), these provisos are, in our view, merely illustrative of the general understanding expressed in the legislative history that Public Law 280 would not affect state power to tax Indians.

2. Indeed, it would tend to frustrate the purpose of Public Law 280, as amended, if tax consequences were to be appended to an election by a tribe to come under state criminal and civil jurisdiction. This is illustrated by the facts of this case.

Washington is not one of the States named in Public Law 280 for immediate conferral of jurisdiction. In 1957, Washington enacted a law purporting to assume over Indian country within the State all jurisdiction permitted by Public Law 280. Enacted Laws 1957, ch. 240, sec. 1, p. 941; see RCWA 37.12.010 Legislative History. This law was amended in advance of the 1968 amendment to Public Law 280 to provide that without Indian consent the State would have jurisdiction within reservations over certain subjects (restricted largely to family relations and motor vehicle registration), but that to reach the full extent of jurisdiction permitted by Public Law 280 the consent of the tribe would be required. RCWA 37.12.010, 37.12.021.[7] The amendment repeated the limitations of Sections 2(b) and 4(b) of Public Law 280 (see pp. 10–11 *supra*) and further provided that the Washington Act shall be subject to the limitations of the federal Act. RCWA 37.12.060, 37.12.070, 37.12.050.

On January 13, 1965, in accordance with the Washington Act, the Colville Tribe adopted a resolution requesting the State to assume criminal and civil jurisdiction within the reservation, and the governor of the State issued a proclamation under RCWA 37.12.021 assuming such jurisdiction (J.S. App. Ap. 5).

[7] We do not comment here on the validity of partial assumptions of jurisdiction prior to the 1968 amendments to Public Law 280.

There is nothing to indicate that the State in making its judicial process available to the Tribe or the Tribe in choosing to submit to it believed that the Tribe and its members were thereby assuming additional tax burdens. If the Tribe had suspected that in submitting its members to state jurisdiction it thereby subjected them to state taxation in areas previously immune, it might well have refused to submit to state jurisdiction.

Moreover, since the 1968 amendment to Public Law 280 requires a majority vote of the enrolled adult Indians before a tribe can submit to state jurisdiction (see p. 6. *supra*), the imposition of state taxes as a consequence of that choice would, throughout the nation, seriously discourage any further elections in favor of state jurisdiction under Public Law 280. This could be particularly unfortunate because the poorest tribes, which often are most in need of state judicial services, can least afford increased taxation. Thus, the statutory purpose, as well as the legislative history previously discussed, supports our view that Public Law 280 has no tax consequences.

3. Our view of the congressional intent is reasonable with respect to the States as well as to the tribes. Merely because a State undertakes to provide judicial services within an Indian reservation, it does not follow that fairness requires that it also be given new taxing authority within the reservation. The States already have substantial sources of income attributable to Indians. Without requiring any particular service from the States, Congress has since 1924 permitted them to tax Indian mineral holdings, 42 Stat. 244, 25 U.S.C. 398, which have often been the only substantial wealth on land noted for its poverty.

Though it is of less significance, Congress has also, without requiring any specific service for the Indians, allowed State gasoline and motor fuel taxes to be imposed on all sales within Indian reservations. 4 U.S.C. 104, 109. Moreover, a substantial part of the goods purchased by Indians living within a reservation are ordinarily purchased outside the reservation where the purchases are subject to state sales taxes without regard to the substantiality of services rendered the purchaser by the State.

Additionally, the Indians subject to state jurisdiction under Public Law 280 remain the beneficiaries of all federal programs for Indian development that would otherwise be available except those concerning crime prevention and law enforcement. Considerable sums are annually expended by the federal government on such programs for tribes which have become subject to state criminal and civil jurisdiction. The Bureau of Indian Affairs, for example, expended $14,072,394 during fiscal year 1971 in California,[8] although Public Law 280 subjected all Indian country within that State to state criminal and civil jurisdiction. The only major category of assistance omitted is "maintaining law and order." These and other programs substantially reduce state responsibilities for providing services to reservation Indians and justify immunities from state taxes which would siphon off resources supplied by the federal government for the

[8] Report of expenditures in fiscal year 1971 from budget submission for fiscal year 1973, supplied to us by the Department of the Interior.

benefit of the Indians and income earned by the Indians who remain on reservations and under federal protection.

It was thus not unreasonable and certainly within Congress' authority in enacting Public Law 280 to choose not to give additional taxing power to States which elect to make their judicial process available to reservation Indians.

II

IT FOLLOWS THAT THE STATE MAY NOT TAX APPELLANT'S SALES TO INDIANS AND THAT THE RELIEF TO BE GRANTED IN THIS DECLARATORY JUDGMENT SUIT WITH RESPECT TO APPELLANT'S SALES TO NON-INDIANS MAY WELL BE AFFECTED BY RECENT CHANGES IN APPLICABLE STATE AND TRIBAL LAW

1. The appellant is a full-blooded enrolled member of the Colville Confederated Tribe. His store is located on the Colville Reservation. A portion of his sales are to Indian residents of the reservation. Public Law 280 does not end federal supervision of trading with Indians on Indian reservations.[9] It makes state civil laws applicable within the reservation only if they are "of general application" (25 U.S.C. 1322(a))

[9] The Department of the Interior has interpreted Public Law 280, which it primarily drafted, as not ending its supervision of trading with Indians on reservations subject to the Act. Although traders have not been licensed for the Colville reservation, we were incorrect in stating in our prior memorandum in this case that licenses had not been required in the State of Washington. See Memorandum pp. 3, 7, 8. In fact, traders have been licensed for the Quinault and Quileute Reservations, both of which are subject to State jurisdiction under Public Law 280.

and thus leaves unchanged the established principle that federal law pre-empts state regulations designed to meet the particular problems of Indian trading. See *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685, 690–692. Moreover, as this Court stated in *Metlakatla Indians* v. *Egan,* 369 U.S. 45, 56 "[Public Law 280] expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation * * *." See pp. 10–11, *supra.*

Because the appellant is a full-blooded Indian, he cannot be required to have a license to trade with Indians. 25 U.S.C. 264. He is, however, a person residing on an Indian reservation trading therein within the meaning of 25 U.S.C. 264.[10] In *Warren Trading Post* v. *Arizona, supra,* this Court invalidated the imposition by the State of Arizona of a gross income tax even on a non-Indian licensed by the federal government to trade on the Navajo Reservation, at least insofar as the tax was applied "with respect to sales made to reservation Indians on the reservation * * * " (380 U.S. at 691–692). The Court held that " * * * the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." 380 U.S. at 691. If the Court agrees with

[10] For the federal regulations concerning trade with Indians on Indian reservations, see generally 25 C.F.R. 251.1–251.26.

our submission (point I, *supra*) that state power to tax is unchanged by Public Law 280, it follows that the taxes of the State of Washington at issue in this case are invalid insofar as they apply to sales to Indians residing on the Reservation.

2. Appellant contends that his sales to non-Indians are also exempt from state taxation. We express no view on this issue, but wish to point out certain considerations that may be of assistance to the Court.

a. Ordinarily Indian traders are not required to distinguish between sales to Indians and sales to non-Indians. The trading posts are in Indian country and are under federal supervision as to all sales. It would be an unwarranted administrative burden to require them to operate under a dual system of licensing and sales. Here the factual situation is peculiar because appellant's sales to non-Indians are a major part of his activity. And, apparently, a major part of those sales are of cigarettes—a product in no way connected with reservation production or manufacture.

b. This is a suit for a declaratory judgment setting forth the appellant's right to do business free of state licensing [11] or taxation. Since the decision below, there

[11] The State's requirement of a license for selling cigarettes (R.C.W.A. 19.91.120) appears to be a civil regulatory law of general application. If, as also appears, its only regulatory purpose is to assist in administering the State's revenue laws, the validity of its application to appellant's sales to non-Indians would in our view be dependent on the issue of the validity of the application of the taxes at issue here to those sales. Under 25 U.S.C. 264 and *Warren Trading Post* (both discussed *supra*, p. 16), the State cannot impose a licensing requirement with respect to appellant's sales to Indians.

have been two significant changes in the state and tribal laws affecting the appellant which have an important bearing on state taxation of appellant's sales to non-Indians, but which have not been considered by the courts below:

(1) On February 28, 1972, the State of Washington amended its laws concerning the taxation of cigarettes to permit Indians such as the appellant to possess unstamped cigarettes and to permit residents of the State to buy up to 400 cigarettes (two cartons) at any time without incurring state tax liability. 1972 Session Laws of the State of Washington, 2nd Extraordinary Session, 42nd Legislature, Chapter 157, Sections 6 and 7 (pp. 522–523) (reprinted in Appellant's Brief, pp. A–39 to A–41). See also the governor's message vetoing a portion of the law that might have required the State to approve Indian sellers. *Id.* at 523–525 (Appellant's Brief, pp. A–41 to A–43).

(2) In apparent cooperation with this change in state law, the Colville Tribe has passed an ordinance restricting sales of cigarettes to non-Indians to two cartons at any time. Appellant's Brief, pp. A–23 to A–28. Resolution 1972–375 enacted by the Colville

Business Council June 23, 1972, approved by the Secretary of the Interior, October 25, 1972, to appear in the Federal Register. Thus, while the issues in this case apparently remain alive with respect to past sales to non-Indians, a quite different situation may now exist with respect to more recent and future sales. These changes in the applicable law are relevant to the relief to be granted in the present suit for a declaratory judgment.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed and the case remanded for further consideration.

Respectfully submitted.

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NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

REPLY BRIEF OF APPELLANT

INTRODUCTION

In their brief, appellees ask the Supreme Court to abandon its traditional, conservative principles of federal Indian law and to adopt radical new principles instead. Appellees ask the Supreme Court to reject the long-standing twin principles that (1) ambiguities in statutes affecting Indians will be resolved from the standpoint of the Indians, and (2) federal statutes, Indian tax immunities, federal Indian policies, and sovereign tribal powers will not be deemed repealed by implication. Appellees ask the Supreme Court to adopt instead the principles that (1) Public Law 83-280 permits all state excise tax laws to apply to Indians *by implication*, and (2) Public Law 83-280 destroys all pow-

ers of tribal sovereignty inconsistent with state law *unless explicitly preserved by Congress.*

In short, appellees ask the Supreme Court to view Public Law 83-280 as a termination bill which effectively destroys the tribal sovereignty of the Colville Confederated Tribes. Although appellees repeatedly deny viewing Public Law 83-280 as a termination statute in any sense of the word, their protest is belied by their brief which states at page 19:

> "Furthermore, if Congress had not intended that Indian sovereignty or self-government be subservient to state laws, it would not have been necessary for it to enact 28 U.S.C. § 1360(c), *supra.*"

And again, at page 34:

> ". . . tribal laws are no longer effective to the extent inconsistent with general state laws and the federal government has removed itself from general supervision of Indian affairs on Indian reservations."

Thus, appellees consider Public Law 83-280 a grant of *plenary jurisdiction* over Indians and Indian country to the State of Washington with only narrow exceptions carved out in Sections 2(b) and 4(b) of the act.

At the same time appellees take an anomalously narrow view of this case and its legal ramifications. In their brief appellees omit the following significant statutes cited by appellant as not relevant:

> 25 U.S.C. § 348 (General Allotment Act of 1887)
>
> 25 C.F.R. § 91.12, 91.13 (1965) (regulations of the Bureau of Indian Affairs pertaining to loans of tribal funds).
>
> Constitution and By-Laws of the Confederated Tribes of the Colville Indian Reservation, Washington.

Colville Tobacco Ordinance As Amended, Resolution 1972-375.

Those portions of Title 82 of the Revised Code of Washington enumerating State excise taxes quoted on pages 6 and 7 of appellant's brief.

In short, appellees attempt to eliminate from consideration all statutes and authorities upon which Indian tax immunities and the tribal power to tax are founded.

Appellees first state that the question presented is whether Public Law 83-280 and State statutes assuming Indian jurisdiction removed any existing impediment which might otherwise preclude the state of Washington from enforcing its cigarette tax laws against the appellant in conducting a retail cigarette business on his restricted land on the Colville Tribe reservation. (Appellees' Br., p. 2-3) But then at the beginning of their argument (Appellees' Br., p. 7), appellees blithely state that the controversy in this cause "is limited" to determining whether the appellant can sell tax-free cigarettes to non-Indians under Washington state law.

The opinion of the Washington Court is not "limited" in applicability to appellant's sales of cigarettes to non-Indians, or, indeed, to cigarette sales at all. As stated by the Washington Court in unmistakably plain language:

> "The trial court was of the opinion that *the authorization contained in Public Law No. 83-280 was plenary, with only the limitations expressed therein*, and gave the states power to regulate the merchandising activities of Indians in the same way that they regulate such activities of their citizens generally, and to levy excise taxes upon them. *We agree.*" (Emphasis supplied)

It is impossible to draw from this language appellees' conclusions that:

> "We are thus here concerned *solely* with the enforcement of the Washington cigarette tax against the appellant to the extent that he sells cigarettes *to persons other than Colville Indians.* (Emphasis supplied) (Appellees' Br., p. 8)

Since no language of limitation in Public Law 83-280 refers to Washington state excise tax laws contained in Title 82 of the Revised Code of Washington, the obvious implication of the Washington court's opinion is that Title 82 applies in full force on the Colville Indian Reservation to all merchandising activities without exception.

1. Appellant's Status as a Federal Indian Trader Cannot Be Denied

Appellees begin their "Statement of the Case" (Appellees' Br., p. 3) with a vigorous attack upon the letters set forth on pages 3-5 of the Single Appendix as "never introduced in evidence", and upon the Colville Tobacco Ordinance and Chapter 157, Washington Laws, 1972, 1st Ex. Sess., both set forth in Appendix A to appellant's brief, as "not properly before the court." The essence of appellees' objections is their position that appellant was not a federal Indian trader at the time this case arose. Appellees wish to deny both federal sanction of appellant's merchandising activities as a retail tobacco merchant on the Colville Indian Reservation, and application of the decision in *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), to this case. (Appellees' Br., p. 40).

No one is more painfully aware than appellant of the inadequacies of the record below. Suffice it to say that

present counsel was in no way involved at the trial level.

Nevertheless, the record is clearly sufficient to enable the Supreme Court to arrive at a properly grounded decision. Appellant testified in part as follows: (Single App., p. 32):

"Q. And what type of business building do you have located on these lands?

"A. It is a little store.

"Q. Can you describe it?

"A. You mean—

"Q. What is it made of and what did it cost you to construct?

"A. Around $6,000.00.

"Q. And where did you acquire the funds to build your place of business?

"A. From the Tribal Loan Office.

"Q. By that you mean you used Tribal funds?

"A. Yes, sir."

Appellant's loan of $6,000.00 of Tribal funds for construction of his store building can be easily demonstrated to be federal sanction of his retail tobacco business on the reservation. The governing provisions of the Code of Federal Regulations, of which the Supreme Court will take judicial notice, pursuant to 44 U.S.C. § 1507, are 25 C.F.R. § 91.12 and § 91.13.

25 C.F.R. § 91.12 entitled "Tribal Funds" provides in part as follows:

> "(a) Tribal funds may be advanced to corporations and unincorporated tribes and bands, when authorized by Congress, upon request of the governing body and approval by the Commissioner, *for the establishment of enterprises* and for relending in accord-

ance with paragraphs (b) and (c) of this section and § 91.13." (Emphasis supplied)

25 C.F.R. § 91.13 entitled "Relending by Borrower", in turn provides in part:

"(a) Funds loaned by the United States to a corporation, tribe, band, or credit association, may be reloaned by it, *with the approval of the Commissioner or his authorized representative*, but the Commissioner may authorize such lenders to approve applications for particular types of loans up to a specified amount.

"(b) Such loans shall be secured by such securities as the lender and the approving officer may require. Individually owned trust or restricted land may be mortgaged for such loans in accordance with § 121.52 of this chapter. All securing documents shall be filed or recorded in accordance with State or Territorial law." (Emphasis supplied)

Thus, appellant's $6,000.00 loan of Tribal funds required specific approval of the Commissioner of Indian Affairs or his authorized representative. However, the federal government went even further—it specifically approved an additional cigarette inventory loan to appellant in the sum of $800.00. It is upon this latter point that appellees' objection rests.

As appellees correctly state, the two letters which show approval of appellant's $800.00 cigarette inventory loan by the Bureau of Indian Affairs were never introduced into evidence but were supplied to the Washington court at the time of oral argument on May 25, 1972. Each is a true copy of a letter in the official Bureau of Indian Affairs records in the Colville Indian Agency of the Bureau of Indian Affairs, and each is certified to by W. Sherwin Broadhead, Superintendent. Their authenticity is beyond question, and indeed appellees do not now question their

authenticity. Rather, appellees contend that they are not part of the record for consideration by the court.

But the appellees did not object to their being made part of the certified record either in oral argument before the Washington Court (see Transcript of Oral Argument) or upon receiving the Index and Clerk's Certificate on approximately January 10, 1972, indicating that the two letters were included in the certified record at pages 117 and 118, respectively. In the Clerk's Certificate executed on January 7, 1972,[1] Mr. William M. Lowry, Clerk of the Supreme Court of the State of Washington affirms that the certified record including the two letters is transmitted to "the Supreme Court of the United States as a record on appeal."

Nor did appellees object to appellant's designating the two letters for inclusion in the Single Appendix (see Appellant's Designation for Appendix and Statement of Issues Presented for Review). Since appellees have never moved to have the two matters excluded from the certified record, appellees may not now contend that the two letters are "not properly before the court."

The Supreme Court is free to consider anything which is a part of the certified record. In *McClellan v. Carland*, 217 U.S. 268 (1910), the Supreme Court stated:

> "We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the Circuit Court of Appeals." 217 U.S. at 283.

Again in *Lawn v. United States*, 355 U.S. 339 (1958), the Supreme Court stated:

> ". . . we must look only to the certified record in

1. R. 172.

deciding questions presented. *McClellan v. Carland*, 217 U.S. 268." 355 U.S. at 354.

In the more recent case of *Lear Inc. v. Adkins*, 395 U.S. 653 (1969) the Supreme Court considered the question of documents not submitted in evidence at trial but considered a part of the record on appeal. The Supreme Court noted:

> "Lear argues that this original agreement was not submitted in evidence at trial and so should not be considered a part of the record on appeal. The California Supreme Court, however, treated the agreement as an important part of the record before it, 67 Cal.2d, at 906, 435 P.2d., at 335; and so we are free to refer to it." 395 U.S. at 657, n. 1.

Since the Washington Court made no direct reference to the letters in its opinion, *Lear* is not directly on point, but from *McClellan* and *Lawn* it would seem that anything which is a part of the certified record on appeal is properly before the Supreme Court and can be considered by it. Further, there are compelling grounds for the proposition that the Supreme Court should take judicial notice of the two letters.

First, the Supreme Court will take judicial notice of official letters of federal agencies setting forth administrative practice. F. Wiener, *Briefing and Arguing Federal Appeals*, 251 (1961); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

The administrative practice here questioned by appellees is the practice of the Bureau of Indian Affairs in making a cigarette inventory loan to appellant to enable him to sell tax free cigarettes on the Colville Indian Reservation. This was made clear by Mr. Michael Hansen, Assistant At-

torney General who argued this matter for appellees before the Washington Court. Mr. Hansen stated at page 26 of the Transcript of Oral Argument:

> "And as we again assert, most strongly, the *Bureau of Indian Affairs* and the State of Washington *has not and to date will not provide funds, loan funds for an Indian for the express purpose of selling unstamped cigarettes.* (Emphasis supplied)

But in the letter of April 9, 1964, the Superintendent of the Colville Indian Agency, recommending approval of the cigarette inventory loan to appellant, states:

> "Their primary income from the store in Omak is from the sale of cigarettes since they are located on trust land and able to sell cigarettes tax free." (Single App., p. 3)

Thus the two letters are official letters setting forth administrative practice of the Bureau of Indian Affairs in this case and should be judicially noticed by the Supreme Court under the rule of *Vermilya-Brown Co.*, and *Foley Bros.*

Additionally, both the Model Code of Evidence of the American Law Institute and the Uniform Rules of Evidence Act provide that a court may upon its own motion take judicial notice of "specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." The two letters clearly fall within that definition.

Finally, in his article "A System of Judicial Notice Based on Fairness and Convenience,"[2] Professor Kenneth Culp Davis states the ultimate principle governing judicial notice as follows:

2. *Perspectives of Law*, Essays for Austin W. Scott, Little, Brown & Co., Pound, 1964, p. 94.

> "The ultimate principle is that extra-record facts should be assumed whenever it is convenient to assume them, except that convenience should always yield to the requirement of procedural fairness that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case."

Appellant submits that by either test, the Supreme Court should judicially notice the two letters which demonstrate beyond doubt that appellant operated as a federal Indian trader in his merchandising activities on the Colville Indian Reservation.

The fact that appellant was not issued a federal Indian trader's license until February 28, 1972 is of no moment. The practice of the Commissioner in 1967 was not to issue traders' licenses in Washington, as counsel for appellant[3] pointed out to the Washington Court in oral argument. The Commissioner refused to issue traders' licenses on the Makah Indian Reservation at counsel's request on behalf of the Makah Indian Tribe.[4] The Washington Court recognized the administrative practice of the Commissioner in this regard.[5]

The Commissioner is even yet reluctant to issue traders' licenses to full-blood Indians, as shown in the memorandum of approval of the Colville Tobacco Ordinance dated October 25, 1972:[6]

> "The provision of the ordinance does not recognize the provision of the law as well as the Secretarial regulations *which permit trading by an Indian of the*

3. Not counsel for the State, as erroneously reported in the Opinions of the Washington Court, 79 Wn.2d 607, 616 n. 4.

4. Transcript of Oral Argument, p. 15, ll. 11-16; p. 27, ll. 11-17.

5. 79 Wn.2d 607, 616 n. 4.

6. 37 F.R. 25181, November 28, 1972.

full blood within an Indian reservation without obtaining a Federal Trader's License (25 USC ∫ 264, 25 CFR 25.13). Should an Indian of the full blood of the Colville Tribes otherwise comply with the provisions of the ordinance governing the sale, distribution and taxation of tobacco products, he cannot be required to obtain a Trader's License as none would be issued to him by the Superintendent and he cannot be denied an operator's license under the ordinance for such reason." (Emphasis supplied)

The conclusion is inescapable—appellant's status as an unlicensed federal Indian trader was sanctioned by the federal government in 1967 at the time this action arose, and he is now a licensed federal Indian trader.

Since the Colville Tobacco Ordinance makes the distribution and sale of all tobacco products on the Reservation a tribal enterprise, and since appellant's business is now a licensed tribal retail outlet operated pursuant to the ordinance, a tribal license, and a federal Indian trader's license, the Ordinance is "properly before the court".

Rule 41(5) authorizes the presentation of "late authorities, newly enacted legislation, or other intervening matters." The Colville Tobacco Ordinance is undeniably relevant to this case as newly enacted legislation. It was published in the Federal Register on November 28, 1972 and appears at 37 F.R. 25181. Accordingly, the Ordinance should be judicially noticed by the Supreme Court in accordance with the "Federal Register Act", 44 U.S.C. § 1507, which provides:

> "The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number."

Wei v. Robinson, 246 F.2d 739 (7th Cir., 1957) cert. den. 355 U.S. 879 (1957).

Chapter 157, Washington Laws, 1972, 1st Ex. Sess., Section 7, provides that any person may purchase and possess for personal use two cartons of cigarettes at any single time without incurring tax liability under Washington law. This new law legitimatizes to that extent non-Indian purchases from Indian sellers of tax free cigarettes, and, again, the statute is undeniably relevant to this case as newly enacted legislation. In the exercise of its general appellant jurisdiction, the Supreme Court takes notice of the laws of every state. *Mills v. Green*, 159 U.S. 651 (1895); *Gormley v. Bunyan*, 138 U.S. 623 (1891).

2. Newly Obtained Congressional History of Public Law 83-280 Proves That the Act Does Not Grant Taxing Power to the State

Both the Washington Court and counsel for the parties in this case have been severely hampered in not having an absolutely clear indication of whether Public Law 83-280 was intended by Congress to constitute a grant of taxing power to the State of Washington. The difficulty arose from non-publication of the Hearing on HR 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83d Congress, 1st Session (June 29, 1953), and the Hearing on HR 1063 Before the Committee on Interior and Insular Affairs, House of Representatives, 83d Cong., 1st Session (July 15, 1953).

These two hearing reports were recently obtained in the National Archives by the Solicitor General and have been made available to counsel for appellant and appellees. In light of the two hearing reports, the statement in appellant's brief that one discovers nowhere in the entire legis-

lative history of the Act any reference to taxation must now be corrected. The Subcommittee Report of June 29, 1953 does contain a discussion of possible tax consequences of Public Law 83-280. And it confirms appellant's previous conclusion that Congress very definitely did not intend Public Law 83-280 to constitute a grant of taxing power to the states.

In the Subcommittee Report, the following dialogue occurs between Congressman Clifton Young of Nevada, Congressman Wesley A. D'Ewart of Montana, Congressman E. Y. Berry of South Dakota, and Mr. Harry A. Sellery, Jr., Chief Counsel, Bureau of Indian Affairs:

> "MR. YOUNG: Does your bill limit the provision for Federal assistance to States in defraying the increased expenses of the courts in connection with the widening of the jurisdiction that the bill encompasses?
>
> "MR. SELLERY: No; it does not.
>
> "MR. YOUNG: *Do you think it would be necessary to provide for some payment, inasmuch as the great portion of Indian lands are not subject to taxation?*
>
> "MR. SELLERY: The Department's report on the Nevada bill has some comments on that. If it is appropriate, I would like to read this in that connection. Generally, the Department's views are that if we started on the processes of Federal financial assistance or subsidization of law enforcement activities among the Indians, it might turn out to be a rather costly program, and *it is a problem which the States should deal with and accept without Federal financial assistance*; otherwise there will be some tendency, the Department believes, for the Indian to be thought of and perhaps to think of himself because of the financial assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from other citizens of the State. And it is desired to give him and the other citizens of the State

the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians.

"MR. YOUNG: That would not quite be true, though; would it? *Because for the most part he does not pay any taxes.*

"MR. SELLERY: *No. There is that difference.*

"MR. YOUNG: A rather sizable difference in not paying for the courts or paying for the increased expenses for judicial proceedings.

"MR. SELLERY: The Indians, of course, do pay other forms of taxes. I do not know how the courts of Nevada are supported financially, but the Indians do pay the sales tax and other taxes.

"MR. YOUNG: But no income tax or corporation tax or profits tax. *You understand a large portion of the land is held in trust and therefore is not subject to tax.*

"MR. SELLERY: *That is correct.*

"MR. YOUNG: So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.

"MR. SELLERY: *I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States.*" (Emphasis supplied) (Subcommittee Report, p. 8, l. 18 through p. 10, l. 15.)

Later in the Subcommittee Hearing the following dialogue occurred:

"MR. D'EWART: I note that the Saylor Bill has a Section 5, *which would make possible compensation of the Federal Government for the expense of enforcement.*

"MR. SELLERY: Yes, sir.

"MR. D'EWART: I think that is the Poulson Bill.

"MR. SELLERY: Yes, sir. That is also in Congressman Young's Bill for Nevada.

"MR. D'EWART: Yes.

"MR. SELLERY: With respect to a comment I had from Congressman Berry after the hearings adjourned regarding *the problem of whether or not the state or local units would be willing to assume the entire cost of administration of civil and criminal jurisdicton* if the bills were passed, without derogation to the Department's position—which, as I indicated in the Nevada Bill, is adverse to that proposal—I did discuss at luncheon with the Acting Commissioner the problem which Congressman Berry had posed, and he suggested that if that proposal were to be accepted by the Committee he believed it would be more appropriate to have the administration of any Federal financial assistance in the hands of the Attorney General of the Department of Justice rather than the Department of Interior. That is not to be understood as a recommendation, Congressman; but *if the Congress in its wisdom sees fit to provide for such assistance,* the Acting Commissioner recommends that it be not to amend the Johnson-O'Malley Act, as someone suggested, but to provide a special authorization in whatever form is required if any such authorization is required to the Attorney General to administer any program of Federal financial assistance to states or political subdivisions.

"MR. BERRY: Why could it not be handled under the Johnson-O'Malley Act?

"MR. SELLERY: The Johnson-O'Malley Act confers the power on the Secretary of Interior. Mr. Greenwood's belief is that *the general administration of law and order being under the Attorney General in the Department of Justice, with the use of the much more extended facilities which the Department has through the FBI, makes that desirable.* The Acting Commissioner thought you might get a more reasoned judg-

> ment on the amount of financial assistance which the state needed. He was just suggesting this as an alternative. No one would deny, I think, that the Johnson-O'Malley Act could be so amended. *He believed that rather than continuing this power in the Secretary in connection with the law and order it would be preferable if the Congress wishes to do that to give that responsibility to the Department of Justice.* There is no doubt that the Department could do it. He just thought it would be more efficient if done by the Department of Justice." (Emphasis supplied) (Subcommittee Report, p. 14, l. 7 through p. 16, l. 4).

Salient points in this dialogue among Congressmen on the Subcommittee representing states with large Indian populations are the following:

First, Congress was well aware of the impending financial burdens to states assuming Public Law 83-280 jurisdiction over Indians. Congress agonized over the problem of increased "law and order" costs of the states and considered whether the federal government should alleviate it with a federal subsidy. But, more importantly, Congress never even considered in committee the possibility of granting taxing powers to the states through Public Law 83-280. A fair reading of the total legislative history of Public Law 83-280 proves that the act was not intended to affect existing Indian tax immunities.

Second, Congress clearly conceived Public Law 83-280 as a law and order measure. Mr. Sellery testified to Acting Commissioner Greenwood's recommendation that any federal subsidy to the states be provided through the Attorney General in the Department of Justice *because of his general administration of law and order.* The Acting Commissioner recommended against funding state subsidies

through the Johnson-O'Malley Act since that Act confers power on the Secretary of the Interior.

Mr. Sellery stressed the Bureau of Indian Affairs' recommendation that Public Law 83-280 be recast to insure its codification in the United States Code in Title 18 of the Criminal Code regarding its criminal aspect, and in title 28 of the Judicial Code regarding its civil aspect, in order to aid attorneys in determining readily what state civil and criminal jurisdiction applied to Indians of a particular state.

Discussion of Public Law 83-280 in the Subcommittee Report is invariably in terms of "the courts", "law enforcement activities among the Indians", "judicial procedure", and "general administration of law and order".

The entire legislative history of Public Law 83-280 verifies Congress' intent to meet a law and order need on Indian reservations by providing a state forum for adjudication of civil and criminal litigation arising on Indian reservations.

The Washington Court ignored the narrow purpose of the Act evident in its legislative history, however, and reasoned that the broad language referring to "civil causes of action" and "civil laws . . . of general application", when coupled with Congress' failure to expressly exclude state taxing power in Section 4(b) of the Act, constitutes an implied grant of taxing power to the State. The logic that state tax laws are civil laws of general application, and thus apply by literal interpretation of the language of the Act. But this conclusion runs afoul of the Supreme Court doctrine which prohibits application of a statute to acts which may be within the letter of the statute but which were

clearly not intended to be within its spirit by Congress. In *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) the Supreme Court considered a federal statute prohibiting importation of an alien to perform labor or service. The Holy Trinity Church, a religious society of New York State, imported an alien from England to serve as its Pastor. The Supreme Court noted that the corporate act was clearly within the letter of the federal statute but held:

> "It is a familiar rule, that a thing may be within the letter of the statue and yet not within the statute, because not within its spirit, nor within the intention of its maker . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an action in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes is unreasonable to believe that the legislator intended to include the particular act." (143 U.S. at 459)

The Supreme Court further stated:

> "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." (143 U.S. at 460)

The multiple absurdities enumerated in Section 4 of Appellant's Brief, which would result from the Washington Court's interpretation of Public Law 83-280, and which are tantamount to termination of the Colville Confederated Tribes compellingly invoke application of the *Holy Trinity Church* rule. Such absurdities are patently not within the spirit of Public Law 83-280 nor within the intention of its makers. The law and order object sought by Congress

through Public Law 83-280 must limit and control the literal import of the term "civil laws . . . of general application to private persons or private property."

3. The State of Washington Has No Residual Jurisdiction to Tax Indians and Indian Commerce Conducted on Indian Reservations

It is here that appellees ask the Supreme Court to abandon its long-standing rule that federal statutes, federal Indian tax immunities, federal Indian policies, and sovereign tribal powers will not be deemed repealed by implication, and to substitute instead the radical proposition that Public Law 83-280 destroys all powers of tribal sovereignty inconsistent with state law *unless explicitly preserved by Congress*. Implicit in appellees' request, of course, is an invitation that the Supreme Court reject its holding in *Williams v. Lee*, 358 U.S. 217 (1959) that the test whether state action applies on an Indian reservation is whether the state action infringes upon the right of the tribe to make its own laws and be ruled by them.

The essence of appellees' argument is:

> "This follows from the elementary proposition that the states have *residual jurisdiction over Indian country and Indian affairs; and they can assert that jurisdiction in imposing taxes* so long as imposition of the taxes is not expressly prohibited by over-riding congressional policy." (Emphasis supplied) (Appellees' Br., p. 13)

What "residual jurisdiction" over Indian country and Indian affairs? Under the Constitution of the United States, there is no state "residual jurisdiction" to impose state taxes upon Indian commerce on Indian reservations. This has been clear ever since *Worcester v. Georgia*, 6 Pet. 515,

was decided by this court in 1832. Appellees' "elementary proposition" runs counter to the entire body of federal Indian law. As stated in *Federal Indian Law*, 1958 (1966 printing by Association on American Indian Affairs, Inc., N.Y.) at page 845:

> "• • • State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation *except by virtue of express authority conferred upon the State by act of Congress.* Conversely Indian property outside of an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found. • • • " (Emphasis supplied.)

In the field of taxation of Indians and Indian commerce on Indian reservations, federal and tribal jurisdiction exhaust the field, leaving no room for state jurisdiction to occupy. This rule remains undiminished, and appellees are unable to cite a single case to the contrary with the exception of the weak citation of *Goudy v. Meath*, 203 U.S. 146 (1906).

Indeed, an examination of the *Goudy* decision reveals the very weakness of appellees' argument. *Goudy* does not involve commercial activity of an enrolled Indian on trust land in a reservation at all! Instead, the case is concerned with state taxability of fee simple land owned by a Puyallup Indian. The Puyallup Indian was allotted in severalty pursuant to the treaty of December 26, 1854, 10 Stat. 1132 which provided state tax immunity *so long as the land was subject to state and federal restrictions.* When the restrictions were removed by the state of Washington and the federal government, the land became subject to state tax.

The Supreme Court upheld the state tax consonant with the long standing rule that fee simple land on Indian reservations is subject to state taxes. *Goudy* decided nothing new.

More important, the present case is concerned with commercial activities of a full-blood Indian trader on Indian trust land. Thus *Goudy* is totally irrelevant. The seemingly broad language quoted by appellees (Appellees' Br., p. 20), when set in context of the facts in *Goudy*, is then totally inapposite to the present case.

Had the language quoted by appellees from the *Goudy* decision been applicable to other contexts, appellant submits that the *Williams*, and *Warren Trading Post Co.*, cases would have been decided by the Supreme Court the other way.

In asking the Supreme Court to adopt their novel rule of implied repeal of federal statutes, Indian tax immunities, Indian policies and sovereign tribal powers, appellees ignore the fact that in enacting Public Law 83-280, Congress followed its own traditional policy of making its repeals explicit. In Section 2(c) of the Act, Congress repealed 18 U.S.C. Section 1152 (Applying the Federal Criminal Code to Indian reservations) and 18 U.S.C. Section 1153 (the Ten Major Crimes Act), and the Act of October 5, 1949 (63 Stat. 705, Ch. 604, applying California civil and criminal jurisdiction to the Agua Caliente Band of Mission Indians), with respect to Indian reservations thereafter subject to state Public Law 83-280 jurisdiction. But Congress did not repeal the federal trader statutes, federal Indian tax immunities, federal Indian policies or sovereign

tribal powers. When Congress specifies the laws it wishes repealed, the courts may not presume that Congress repealed other laws by implication.

4. Appellees Ignore Indian Tax Immunities Established by Congressional Policy and Protected by Decisions of the Supreme Court

Analysis of arguments 2 through 5 of appellees reveals that wholly apart from questions covering Public Law 83-280 and its effect, appellees give no consideration whatsoever to federal policies regarding self-determination of Indian tribes, Indian trading, or utilization of Indian trust land, all carefully protected by decisions of the Supreme Court.

In marked contrast to the "termination" policies of the early 1950's, our national Indian policy is now one of strengthening tribal government and fostering self-determination of Indian tribes, both socially and economically. This policy was recently enunciated by President Nixon in his historic speech to Congress of July 8, 1970:[7]

> ". . . Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.
>
> "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community.
>
> ". . . .
>
> "Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Con-

7. H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (1970).

current Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress."

House Concurrent Resolution 108 of the 83rd Congress was renounced, repudiated and repealed by Senate Concurrent Resolution 26 adopted on December 11, 1971.[8]

Senate Concurrent Resolution 26 reads in part as follows:

> "*Resolved by the Senate (the House of Representatives concurring)*: That it is the sense of Congress that—
>
> . . . .
>
> "(2) this statement of national Indian policy replaces the policy set forth in House Concurrent Resolution 108, Eighty-third Congress (August 1, 1953);
>
> "(3) improving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy."

The above stated national Indian policy simply cannot coexist with the position set forth in appellees' brief "that Indian sovereignty or self-government be subservient to state laws", that "tribal laws are no longer effective to the extent inconsistent with state laws," and that "the federal government has removed itself from general supervision of Indian affairs on Indian reservations". Appellees plainly deny that in our dual federal-state form of government, Indian tribes occupy a unique third category of "domestic dependent nation" with quasi-sovereign powers and inherent immunity from state taxation, *Worcester, supra.*

8. S. Con. Res. 26, 92nd Cong., 1st Sess., 118 Cong. Rec. S 21327 (1971).

Among their powers of sovereignty, Indian tribes themselves have the power to tax. The Supreme Court held in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), that the power to tax is an attribute of sovereignty "essential to the very existence of government," and as stated in *Federal Indian Law* at page 435, the power to tax is an attribute of tribal quasi-sovereignty *which continues unless withdrawn by act of Congress or limited by treaty.*

Not only has the power to tax of the Colville Confederated Tribes not been withdrawn by Congress, it has been carefully embodied in Article V(1)(e) of the tribal constitution, and applies both to Indians and to "nonmembers doing business within the Reservation" including non-Indian customers of appellant. All sales of tobacco products by appellant and other licensed Indian traders on the Reservation are now taxed by the tribes through the Colville Tobacco Ordinance. Federal sanction is twofold; the government approved both the tribal constitution and the tobacco ordinance.

Appellees argue that application of the state tax to appellant's sales in no way interferes with the tribal power to tax, and, that even if it does, the sovereign tribal power is now subservient to state laws. But application of *both* state and tribal tax would destroy appellant's business altogether, for none but the simple minded would continue to trade with him. And in such a head-on conflict between state and tribal taxing powers, the Supreme Court has made it clear that tribal taxing power must stand supreme, *Williams, supra.*

With regard to the subject of Indian trading, appellees engage in lengthy argument to demonstrate that federal policy does not include within its scope retail sales of mer-

chandise from Indian merchants to non-members on the reservation. The argument does not withstand analysis. For as Mr. Justice Black indicated in *Warren, supra,*

> "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690.

And Article V(1)(e) of the tribal constitution contemplates taxation by the tribe of merchandising activities involving both Indians and non-Indians on the reservation —free from any interfering taxation by the state of Washington.

Concerning utilization of Indian trust land, appellees contend in argument 5 of their brief that no Indian governmental immunity to state taxes exists where the state taxes have only an indirect or remote effect on the government instrumentality claiming the immunity. In this contention, appellees fail to analyze properly the true basis for Indian tax immunities—namely federal instrumentality *and* federal purpose—and fail to note the direct effect of state taxation upon both in this case.

Appellees rely upon a line of Supreme Court cases of which *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), and *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948), are the foundation stones. In *Oklahoma Tax Commission*, the Supreme Court upheld an Oklahoma death tax on restricted cash and securities of enrolled members of the Five Civilized Tribes, arising from proceeds of sale or minerals on the Indians' restricted land. In *West* the Supreme Court upheld the Oklahoma death tax on *trust* property of Osage Indians residing on the reservation.

But appellant respectfully submits that the rule of *Oklahoma Tax Commission* and *West* is no longer valid law. The two main underpinnings of the cases were rejected by the Supreme Court in *Squire v. Capoeman*, 351 U.S. 1 (1956). In *Squire*, the Supreme Court denied application of federal capital gains tax to proceeds of sale of timber from the trust allotment of a Quinault Indian living on the reservation. While in *West*, the Supreme Court ignored as immaterial the facts that (1) to allow the Oklahoma death tax would be to allow a state lien on Indian trust property, and (2) the estate could be depleted through successive payments of state death taxes before the end of the trust period, *Squire* proceeded in the opposite direction, holding that (1) provision in the General Allotment Act for transfer of the trust property at the end of the trust period "free of all charge or encumbrance" might well be sufficient to bar federal income taxation, and (2) it is necessary to preserve the property wholly intact for the Indian—including immunity from taxation—in order that he could go forward when declared competent with the necessary chance of economic survival in competition with others.

A partial explanation for this reversal lies in the fact that at the time *Oklahoma Tax Commission* and *West* were decided, it was generally assumed that restricted trust Indian property was subject to both federal income and federal estate taxes. In *Oklahoma Tax Commission*, the Supreme Court had noted:

> "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." 319 U.S. at 608.

That assumption has since been proven incorrect. *Squire* held the Indian exempt from federal gains tax, and *Nash v. Wiseman*, 227 F.Supp. 552 (W.D.Okla. 1963), and *Asenap v. United States*, 283 F.Supp. 566 (W.D.Okla. 1968), extended the rule of *Squire* to federal estate taxes on Indian trust property. Thus the demand for equal treatment of state and federal taxes which concerned the Supreme Court in *Oklahoma Tax Commission* and *West* now works the other way—against taxability. *Mason v. United States*, 461 F.2d 1364 (Ct.Cl. 1972). *Squire* has reversed the presumption evident in *Oklahoma Tax Commission* and *West* that Indian tax immunity required an affirmative indication by Congress, and instead returned to the time-honored presumption that Congress should affirmatively authorize taxability if it intended to permit it.

A number of lower courts have applied *Squire* to Indians not covered by the General Allotment Act. *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957) applied *Squire to* the trust allotment of a California Mission Indian whose allotment derived from the Mission Indian Act which did not contain the "taxation" provision of the General Allotment Act. In *Big Eagle v. United States*, 300 F.2d 765 (Ct.Cl. 1962), the Court of Claims applied *Squire* to federal income tax upon income derived from Osage trust properties. *United States v. Hallam*, 304 F.2d 620 (10th Cir. 1962) applied *Squire* to the Quapaw Indians who, like the Osages, had their own allotment act.

Commercial activities located on trust land have an inherent goal of profitability and therefore partake of the tax immunity spelled out in *United States v. Rickert*, 188 U.S. 432 (1903), and *Squire, supra*. As stated in "Indian

Taxation: Underlying Policies and Present Problems", 59 Calif. L. Rev. 1261 (1971), at page 1274:

> "However, the immunity's purpose of maximizing the value of the protected land to its Indian owner can be achieved only if the land is immune from all other taxes which adversely affect its value. The real property tax exemption therefore provides a strong basis for striking down taxes on personal property, income, estates, possessory interests, and sales that defeat the purpose of the basic immunity."

The rationale of the cases cited by appellees on page 47 of their brief makes no sense when applied to Indian tax immunity cases. The rule that imposition of a pure financial burden upon the federal government is normally too remote an interference with governmental policies to be invalid rests upon the concept that the government has neither a financial interest in the instrumentality nor an interest in maximizing return from the instrumentality. For example, in *Graves v. New York*, 306 U.S. 466 (1939), the Supreme Court stated:

> "[T]he purpose of the immunity was not to confer benefits on the employees . . . or to give an advantage to that government . . . but to prevent undue interference with the one government by imposing on it the tax burdens of the other." 306 U.S. at 483.

But the central policy goal of federal policy regarding Indian trust land is profitability of the trust lands. The rationale of appellees' cases is not even altogether applicable in non-Indian cases, as shown in *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961), in which the court struck down a state tax upon a federal land bank because of a manifest federal policy of profitability of the enterprise.

Recognizing the federal policy of profitability of Indian trust land, the author of "Indian Taxation: Underlying Policies and Present Problems", *supra*, states at page 1295:

> "Taxation of sales occurring on protected Indian land diminishes the land's value by decreasing its profit potential, much as does the taxation of personal property located on such land. The reasons for invalidating taxes on personal property located on exempt Indian land similarly require that state and local taxes be struck down if they are imposed on sales occurring on such land."

The Washington tax here in question could result in liens upon the trust land and personal property of appellant contrary to federal policy regarding Indian trust land as an instrumentality. The Washington tax also decreases the profit potential of appellant's trust land contrary to the federal purpose of Indian trust land. In the face of *Squire* and *Federal Land Bank*, the Washington tax cannot apply. As stated by Judge Ely in his dissenting opinion in *Agua Caliente v. Riverside County*, 442 F.2d 1184, 1189 (9th Cir. 1971), referring to *Squire*:

> ". . . [T]he case stands for the proposition that the federal policy of protecting Indian wards is superior even to the need to collect revenue for the maintenance of the federal government itself. Surely, we should afford no less protection when the interest of the Indian ward is in conflict with an interest of a State."

5. Under Present Washington State Law and Policy, State Excise Taxes Can No Longer Be Applied to Appellant

At the time of appellant's arrest in February, 1967, appellant operated an independent business on the Colville Indian Reservation. The Colville Confederated Tribes had no tobacco ordinance; nor was appellant licensed either

by the Tribes or by the federal government. State law prohibited possession by any non-Indian in the state of untaxed cigarettes. The state policy reason for enforcing its excise tax laws against appellant at that time was pointed out by appellees in oral argument before the Washington Court:

> "Since the state has no particular, definitely has n feeling with regards to his sale to non-Indians, to Indians of the tribe, we have specifically under our cigarette tax laws allowed that Indian to purchase unstamped cigarettes. But what we are trying to control here is sale of cigarettes to non-Indians, to those citizens of the State of Washington."[9]

The problem, according to appellees was that:

> "Because a substantial amount of the territory of the state of Washington is 'Indian country' and because 'Indian country' is next to or commingled with large population centers, tax-free sales of cigarettes by Indians to the general public pose a problem of significant magnitude to the state of Washington. The state of Washington's ability to effectively enforce its cigarette tax law lies at the heart of this controversy." (Appellees' Br., p. 8)

All that has changed. The Colville Tobacco Ordinance now makes the handling and sale of all tobacco products on the reservation a tribal enterprise, and appellant's business is a licensed tribal retail outlet. Appellant operates his business pursuant to the Ordinance, his tribal license,[10] and his federal trader's license.[11] Additionally, Chapter 157, Washington Laws, 1972, 1st Ex. Sess., Section 7, provides that any person, Indian or non-Indian, may purchase and possess for personal use two cartons of cigar-

9. Transcript of Oral Argument, p. 20, ll. 17-22.

10. App. Br., p. B-2.

11. App. Br., p. B-1.

ettes at any single time without incurring tax liability under Washington law.

Since the purpose of prior state law was to control sale of cigarettes to non-Indians and since the present state law specifically allows non-Indians to purchase and possess unstamped cigarettes, the policy reason for application of state excise tax to appellant disappears, and the "heart of this controversy" has been cut out. The state cigarette excise tax law can no longer be applied to appellant *as a matter of state law.*

To hold that non-Indians could purchase untaxed cigarettes from the commissaries of military installations in Washington, and from the neighboring states of Oregon and Idaho, whose cigarettes' taxes are, respectively, 13 cents and 10 cents a package less than Washington's, but not from Indians, would be to allow a violation of the equal protection provisions of both the state and federal constitutions. And as appellees admitted to the Washington Court:

> "MR. HANSEN: We feel it would be very significant that if the federal government would so license individuals to sell cigarettes, unstamped cigarettes, we would very much have to look into our approach on the matter."[12]
>
> . . . .
>
> "And as we again assert, most strongly, the Bureau of Indian Affairs and the State of Washington has not and to date will not provide funds, loan funds to an Indian for the express purpose of selling unstamped cigarettes. If and when they do, the Department of Revenue will indeed have to re-examine the appropriate legislation in this area . . ."[13]

12. Transcript of Oral Argument, p. 23, ll. 20-22.
13. Transcript of Oral Argument, p. 26, ll. 5-9.

6. State Extension of Governmental Services to Members of the Colville Confederated Tribes Does Not Subject the Indians to State Tax Laws

One final point remains. On page 62 of their brief, appellees state:

> "The fact that the Washington Indians enjoy all the rights and privileges which are enjoyed by citizens generally, supports appellees' argument that Indians should be subjected to general state laws, including those pertaining to taxation, particularly after the assumption under PL. 83-280."

This argument that *because* members of the Colville Confederated Tribes receive state services *therefore* they should be subjected to general state tax laws with or without Public Law 83-280, had appeal for the Washington Court and must be answered.

The obvious answer was given by President Nixon in his speech to Congress on July 8, 1970, *supra*. The President stated:

> "The special relationship between Indians and the Federal Government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to *provide community services, such as health, education and public safety*, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans." (Emphasis supplied)

The Indians, including appellant, have paid their taxes in perpetuity by surrendering their vast tracts of land to

the federal government. For example, the Colville Confederated Tribes surrendered the north half of their reservation, an area comprising approximately 1.5 million acres, in the Agreement of May 9, 1891, and the north half was vacated by the Act of July 1, 1892, 27 Stat. 62 (1 Kappler 441). While the Tribes were paid $1,500,000 for the land, in 1904 there were in Ferry County alone 146 mine owners whose property and improvements were valued on the County Assessor's rolls at $880,000,000. "An Illustrated History of Stevens, Ferry, Okanogan and Chelan Counties," Richard F. Steele, Western Historical Publishing Company, 1904.

In addition, both the Bureau of Indian Affairs and the Colville Confederated Tribes themselves make large expenditures annually for social and governmental services to Indians. Expenditures of the Colville Indian Agency of the Bureau of Indian Affairs for the years 1965 through 1972, are as follows:

1965	$ 1,460,851
1966	1,174,330
1967	1,097,258
1968	1,382,860
1969	1,680,564
1970	1,783,923
1971	1,402,725
1972	2,157,711

These federal expenditures are set forth by category in Appendix A.

Expenditures of the Colville Confederated Tribes for the years 1966 through 1972 are as follows:

1966	$362,935.63
1967	431,994.51
1968	432,307.85
1969	500,817.19
1970	599,488.06
1971	536,414.00
1972	620,090.00

These tribal expenditures are set forth by category in Appendix B.

The figures of the Bureau of Indian Affairs exclude expenditures for Indian health services and other federal services provided to the general public. While tax jurisdiction does not depend upon relative expenditures, the federal and tribal expenditures listed demonstrate that the federal government has not removed itself from general supervision of the Colville Indian Reservation and that members of the Tribes are paying their own way.

CONCLUSION

The Supreme Court should not adopt appellees' radical new principles that (1) Public Law 83-280 permits all state excise tax laws to apply to Indians *by implication*, and (2) Public Law 83-280 destroys all powers of tribal sovereignty inconsistent with state law *unless explicitly preserved by Congress*. Instead, the Supreme Court should adhere to its long standing twin principles that (1) ambiguities in statutes affecting Indians will be resolved from the standpoint of the Indians, and (2) federal statutes,

Indian tax immunities, federal Indian policies, and sovereign tribal powers will not be deemed repealed by implication. Applying these principles in this case, the Supreme Court should reverse the decision of the Washington Court.

Respectfully submitted,

ZIONTZ, PIETILE & MORISSET
ROBERT L. PIETILE
Counsel for Appellant

December 1, 1972

APPENDIX A

IN REPLY REFER TO:
Budget

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
PORTLAND AREA OFFICE
POST OFFICE BOX 3785
PORTLAND, OREGON 97208

RECEIVED
NOV 13 1972
ZIONTZ, PE & MORISSET

NOV 10 1972

Ziontz, Pirtle & Morisset
Attorneys at Law
3101 Seattle-First National Bank Building
Seattle, Washington - 98104

Dear Mr. Pirtle:

This is in answer to your letter of November 8, 1972 requesting certain information concerning services furnished to the Colville Confederated Tribes and its members by the Bureau of Indian Affairs.

On the attached sheet we have shown the annual obligations by activity for the Colville Agency for Fiscal Years 1965 through 1972.

Sincerely yours,

Francis E. Briscoe

Francis E. Briscoe
Assistant Area Director
(Administration)

Enclosure (1)

COLVILLE INDIAN AGENCY
UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFA
(ANNUAL OBLIGATIONS OR EXPENDITURES BY ACTIVITY)
FISCAL 1965 THROUGH FISCAL 1972

	1965	1966	1967	1968	1969	19
Education	$ 63,320	$ 57,895	$ 55,560	$ 30,849	$ 25,132	$ 22,
Adult Education	-	-	-	22,854	21,147	26,
Social Services	30,235	40,170	43,539	41,203	50,145	43,
Housing Improvement	-	-	-	-	-	-
Relocation	772	960	808	8,561	14,307	20,
Adult Vocational Training	916	960	808	-	116	
Law and Order	52,007	29,823	16,540	13,578	12,594	15,
Forestry	337,017	378,762	349,635	356,543	375,454	666,
Range	35,938	36,261	37,460	38,617	42,250	45,
Fire Suppression	22,256	10,585	24,244	32,658	106,839	86,
Reservation Programs	16,895	17,545	18,755	19,182	21,364	15,
Housing Development	-	-	-	-	-	
Soil and Moisture Conservation	66,694	67,649	62,691	58,744	71,119	78,
Indian Water Rights	-	-	-	-	-	
Roads Maintenance	113,300	117,819	115,715	147,901	114,605	123,
Realty	93,034	97,200	102,638	97,803	93,076	108,
General Trustee Services	13,088	17,641	14,207	14,253	15,928	17,
R&M,Buildings and Utilities	61,675	55,215	66,489	49,548	58,745	74,
&M, Irrigation	3,500	-	6,294	6,636	6,636	
Indian Business Development	-	-	-	-	-	
Construction - Bldgs & Utils	7,838	36,098	17,445	9,743	4,891	36,
Roads Construction	542,366	209,747	164,430	434,187	646,216	402
	1,460,851	1,174,330	1,097,258	1,382,860	1,680,564	1,783,

Portland Area Office
November 30, 1972

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A-2 APPENDIX A

COLVILLE INDIAN AGENCY

UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS
(ANNUAL OBLIGATIONS OR EXPENDITURES BY ACTIVITY)

FISCAL 1965 THROUGH FISCAL 1972

	1965	1966	1967	1968	1969	1970	1971	1972
	$ 63,320	$ 57,895	$ 55,560	$ 30,849	$ 25,132	$ 22,759	$ 73,783	$ 155.129
	-	-	-	22,854	21,147	26,602	20,458	15,673
	30,235	40,170	43,539	41,203	50,145	43,696	43,095	46,006
	-	-	-	-	-	-	-	53,998
	772	960	808	8,561	14,307	20,369	29,021	30,348
	916	960	808	-	116	-	6,000	-
	52,007	29,823	16,540	13,578	12,594	15,361	14,141	940
	337,017	378,762	349,635	356,543	375,454	666,907	460,297	507,628
	35,938	36,261	37,460	38,617	42,250	45,531	38,550	34,865
	22,256	10,585	24,244	32,658	106,839	86,823	136,498	39,773
	16,895	17,545	18,755	19,182	21,364	15,295	27,125	29,446
	-	-	-	-	-	-	-	15,000
vation	66,694	67,649	62,691	58,744	71,119	78,699	92,717	92,968
	-	-	-	-	-	-	-	17,500
	113,300	117,819	115,715	147,901	114,605	123,499	117,141	126,888
	93,034	97,200	102,638	97,803	93,076	108,011	100,354	99,524
	13,088	17,641	14,207	14,253	15,928	17,349	12,883	13,505
es	61,675	55,215	66,489	49,548	58,745	74,186	88,059	339,227
	3,500	-	6,294	6,636	6,636	-	-	-
ent	-	-	-	-	-	-	34,540	-
ils	7,838	36,098	17,445	9,743	4,891	36,622	3,777	33,457
	542,366	209,747	164,430	434,187	646,216	402,214	104,286	505,836
	1,460,851	1,174,330	1,097,258	1,382,860	1,680,564	1,783,923	1,402,725	2,157,711

APPENDIX B

COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATI

BUDGET ITEMS FOR 1966 THROUGH 1972

	1966	1967	1968	1969	1970
1. Education:					
A) St. Mary's Mission	$20,000.00	$23,088.00	$20,000.00	20,000.00	20,000.
B) Education Scholarship	16,200.00	19,000.00	20,813.00	24,638.00	29,594.
C) Education Aid Grants	11,618.00	10,011.00	14,908.00	12,054.00	21,314.
D) Youth Camp	17,909.00	13,323.00	1,871.00	4,165.00	8,898.
E) Misc. Educational Expenses	825.00	3,167.00			
TOTAL COSTS	$66,552.00	68,589.00	57,592.00	60,857.00	79,806.
2. Health, Welfare & Community Services:					
A) Health & Sanitation	$13,861.00	9,359.00	4,150.00	10,059.00	22,822.
B) Welfare, Burial, Fire & Etc.	15,366.00	14,700.00	21,702.00	30,628.00	36,380.
C) Donations	4,976.00	2,850.00	3,295.00	4,196.00	3,544.
D) Tribal Gatherings	2,374.00	1,838.00	2,663.00	3,336.00	8,328.
E) Law & Order (Donation to Counties)	11,123.00	31,397.00	20,146.00	36,326.00	36,179.
F) Roads		2,234.00			
TOTAL COSTS	$47,700.00	62,378.00	51,956.00	84,545.00	107,253.
3. Environmental Protection & Recreation:					
A) Fire & Wildlife Propagation	$14,784.00	28,827.00	33,664.00	40,904.00	55,851.
B) Fire Control	40,157.00	44,157.00	48,514.00	55,034.00	55,855.
C) Soil, Moisture, Beautification & Range Improvement	20,014.00	16,185.00	19,154.00	11,106.00	20,000.
TOTAL COSTS	$74,955.00	89,169.00	101,332.00	107,044.00	131,706.
4. Administrative Costs:					
A) Administrative Services	$64,729.61	79,524.30	79,522.99	93,881.42	100,613.
B) Paid to Counties (for their Admin. Costs)	40,000.00	40,000.00	40,000.00	40,000.00	40,000.
C) Personnel Services	36,192.52	52,912.92	62,312.98	73,981.14	140,109.
D) General Services	32,806.50	37,187.19	39,591.88	40,508.63	
E) Roads		2,234.10			
TOTAL COSTS	$173,728.63	211,858.51	221,427.85	248,371.19	280,723.
TOTAL ANNUAL COSTS	$362,935.63	431,994.51	432,307.85	500,817.19	599,488.

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APPENDIX B

COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

BUDGET ITEMS FOR 1966 THROUGH 1972

	1966	1967	1968	1969	1970	1971	1972
n	$20,000.00	$23,088.00	$20,000.00	20,000.00	20,000.00	20,000.00	20,000.00
hip	16,200.00	19,000.00	20,813.00	24,638.00	29,594.00	38,250.00	31,704.00
ts	11,618.00	10,011.00	14,908.00	12,054.00	21,314.00	34,480.00	28,296.00
	17,909.00	13,323.00	1,871.00	4,165.00	8,898.00	18,443.00	14,161.00
Expenses	825.00	3,167.00				1,982.00	842.00
	$66,552.00	68,589.00	57,592.00	60,857.00	79,806.00	113,155.00	95,003.00
mmunity Services:							
	$13,861.00	9,359.00	4,150.00	10,059.00	22,822.00		
ire & Etc.	15,366.00	14,700.00	21,702.00	30,628.00	36,380.00	28,247.00	25,850.00
	4,976.00	2,850.00	3,295.00	4,196.00	3,544.00	8,313.00	8,569.00
	2,374.00	1,838.00	2,663.00	3,336.00	8,328.00	2,907.00	5,287.00
tion to Counties)	11,123.00	31,397.00	20,146.00	36,326.00	36,179.00	(discontinued)	
		2,234.00					
	$47,700.00	62,378.00	51,956.00	84,545.00	107,253.00	39,467.00	39,706.00
on & Recreation:							
pagation	$14,784.00	28,827.00	33,664.00	40,904.00	55,851.00	81,814.00	94,140.00
	40,157.00	44,157.00	48,514.00	55,034.00	55,855.00	52,549.00	52,144.00
utification &	20,014.00	16,185.00	19,154.00	11,106.00	20,000.00	23,000.00	20,873.00
nt							
	$74,955.00	89,169.00	101,332.00	107,044.00	131,706.00	157,363.00	167,157.00
ices	$64,729.61	79,524.30	79,522.99	93,881.42	100,613.80	85,697.00	113,776.00
r their Admin. Costs)	40,000.00	40,000.00	40,000.00	40,000.00	40,000.00	(discontinued)	
	36,192.52	52,912.92	62,312.98	73,981.14	140,109.26	140,732.00	204,448.00
	32,806.50	37,187.19	39,591.88	40,508.63			
		2,234.10					
	$173,728.63	211,858.51	221,427.85	248,371.19	280,723.06	226,429.00	318,224.00
	$362,935.63	431,994.51	432,307.85	500,817.19	599,488.06	536,414.00	620,090.00

APPENDIX B

EXPLANATION OF TRIBAL EXPENDITURES

1. EDUCATION.

(a) *St. Mary's Mission*—St. Mary's Mission is an all-Indian Institution with instruction through the first six grades. The Mission operates on a budget of approximately $100,000 per annum. Of this amount, $15,000 comes from student per capita and $20,000 from Tribal funds. Per capita funds are generated by Tribal business activities. This Mission serves not only as an Educational Institution but also provides recreational facilities, spiritual guidance and, most importantly, a home environment for those children who otherwise would have no home.

(b) *Education Scholarships and Grants*—The Colville Confederated Tribes donate each year an average of $44,700 in the form of two or four year scholarships and immediate need to Tribal members attending either vocational or liberal arts institutions.

(c) *Youth Camp*—Tribal expenditures for the Youth Camp average $11,252 per year. The camp offers recreation and lessons in Colville arts, crafts, and culture thus insuring the continuation of Colville heritage.

(d) *Miscellaneous Educational Expenses* — Miscellaneous matters not covered under items (a)-(c) above.

2. HEALTH, WELFARE AND COMMUNITY SERVICES.

(a) *Health & Sanitation*—From the period beginning in 1963 and ending in 1971 the Tribe contributed to the Public Health Service approximately 10% of the funds required for a Sanitation and Construction Project.

(b) *Welfare, Burial and Aid to Fire Victims*—The Tribe contributes an annual average of $24,700 for:

(1) Needy families who are not eligible for State aid;

(2) All burial services for those Tribal members and often for unenrolled infants;

(3) Granting funds to those families who are left homeless due to fire.

(c) *Donations*—The Tribe donates an annual average of $5,100 for worthwhile Community Services such as the Boy & Girl Scouts, Town & County Fairs, Little League and a variety of other community causes.

(d) *Tribal Gatherings*—These expenditures cover maintenance and upkeep of celebration grounds which are the center of Tribal activity. Traditional feasts and ceremonies are held for the enjoyment of all the Tribal members.

(e) *Law & Order (Paid to the Counties)*—Until 1971 the Colville Tribes gave an average of $19,300 to Okanogan and Ferry Counties for law enforcement. Because the State could not adequately protect the reservation and because of advice of legal counsel, these payments were discontinued in 1971.

(f) *Roads*—Repair and maintenance of roads not covered in BIA budget.

3. Environmental Protection & Recreation.

(a) Fish & Wildlife Propagation.

An annual average of $50,000 is spent by the Tribes in the form of salaries for Tribal Game Wardens and Law enforcement Officials. As stated previously in section 2(e), State law enforcement Officers cannot adequately protect the Colville Reservation hence these officers have the responsibility of properly protecting our Fish & Wildlife, the natural resources and arresting violators within the bounds of this reservation.

(b) *Fire Control*—The Colville Indian Reservation has large quantities of Timber spread over a very large area and logging is the primary source of income to the Tribes. Extreme care is taken to protect this timber in the form of selective logging, planting seedlings and especially fire control. Fire control not only protects our source of income but more important, protects the environment with which different species of wildlife thrive.

(c) *Soil, Moisture, Beautification & Range Improvement*—In 1966-67, the Tribes funded three positions under Soil

& Moisture Conservation; one full time labor foreman and two laborers. The labor foreman supervised permittees, laborers and lessees in the installation and construction of improvements on agricultural lands. A major portion of the Range Technician's time was spent on the Tribal Range Improvement Program which included grazing permit compliance checks and utilization checking and mapping.

From 1969-71, positions of Range Technician and Soil Conservation were funded by the Tribe. Their work consisted of carrying out the Tribal Range Improvement Program, contacting Tribal members who wanted to go into the livestock business or to increase their herd yields, planting grass seed, locating springs and a variety of tasks which involved Range Land.

4. ADMINISTRATIVE COSTS.

(a) *Administrative Services*—These are the costs that enable our Business Council to function as the governing body of the Colville Confederated Tribes.

(b) *Administrative Costs Paid to Counties*—Until 1971 $40,000 per year was paid to Okanogan and Ferry Counties pursuant to a purported agreement between the counties and the Tribes. These payments were discontinued in 1971 on the grounds that the Tribes were in fact providing the services for themselves and on the advice of legal counsel that the purported agreement was void and without consideration.

(c) *Personnel Services*—These are the costs sustained by the Tribes for supporting services e.g., Enrollment Officer, executive Secretary, recording Secretary, etc. The primary function of these positions is to carry on the day to day business activities and decisions made by the Council committees.

(d) *General Services*—General services are overhead required to operate any type of Government organization, e.g., janitorial services, telephone, mail, payroll taxes, etc. These were combined with personnel services from 1970 on.

(e) *Roads*—Administrative costs related to roads not included in BIA road budget.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1972

No. 71-1081

LEONARD TONASKET, *Appellant*,

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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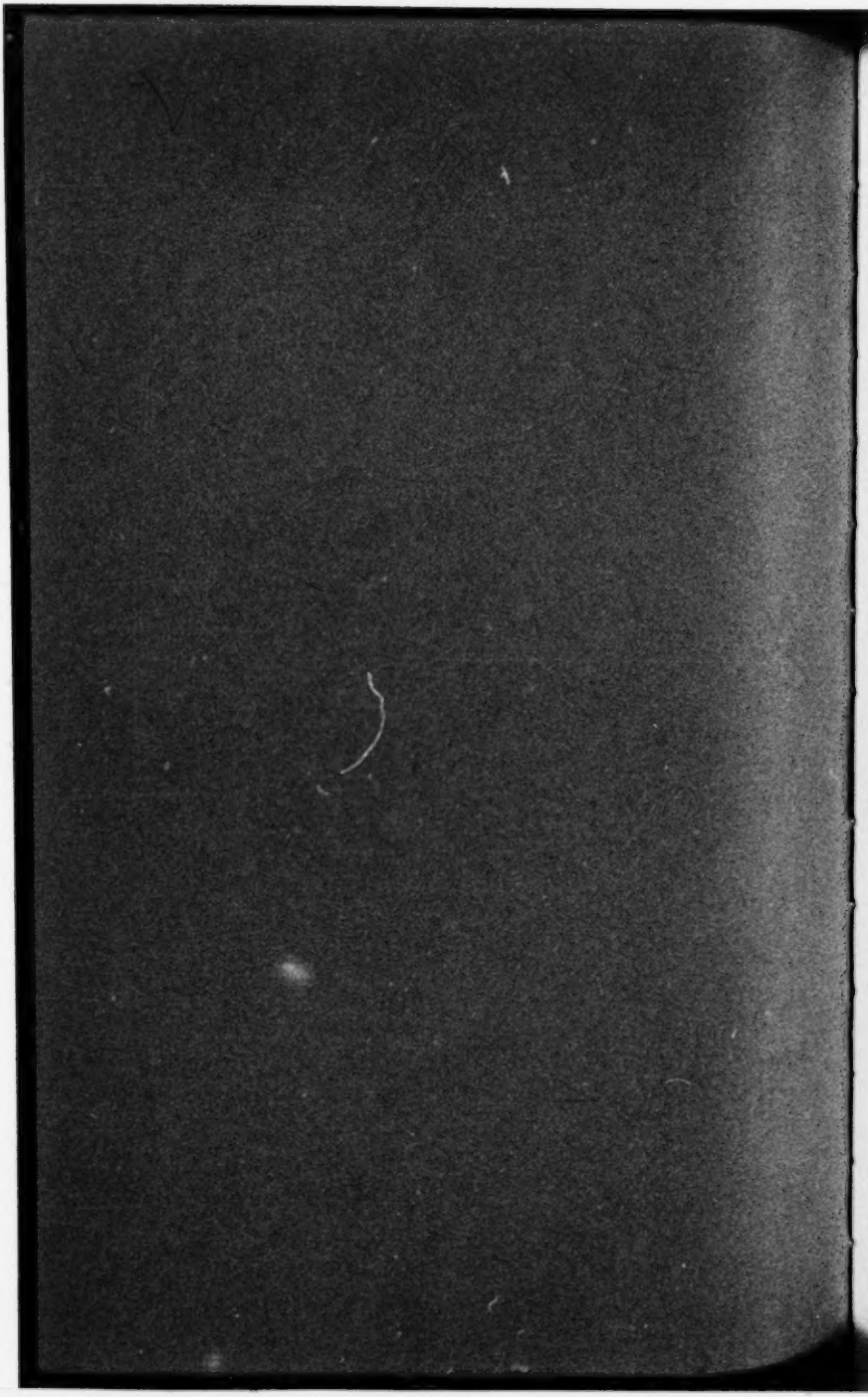
STATE PRINTING PLANT, OLYMPIA, WASHINGTON



IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1972

No. 71-1031

LEONARD TONASKET, *Appellant*,

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ARGUMENT

I

Introduction

In this brief, the State will not attempt to respond to every point raised by the United States. Rather, it will address itself to a single issue, an issue of such fundamental importance as to merit, in the opinion of the State, a written reply. And that issue is simply this: Does this litigation pri-

marily concern sales of cigarettes by an Indian to other Indians? Or does it primarily concern sales of cigarettes by an Indian to non-Indians?

On the second question, the United States takes no position, confining itself, on the merits, to the first question. (Br. of United States 17). However, it suggests that, by reason of chapter 157, Laws of 1972, the second question may have become moot.

In contrast, it is the position of the State that the United States has the two questions turned precisely upside down. If any question is moot, it is the first question, i.e., the question of sales by Indians to other Indians. As pointed out in the State's original brief (pp. 7-9), it is this second question which is the critical one. And chapter 157, Laws of 1972, Ex. Sess., in no way makes this critical question moot.

II

The Provisions of the State's Cigarette Tax Act Provide an Exemption for Sales of Cigarettes by an Indian Tribe to Indian Consumers

In chapter 214, Laws of 1969, First Ex. Sess., the legislature amended the provisions of the Washington state cigarette tax (chapter 82.24 RCW) to allow sales by an Indian tribal organization to its own tribal members as consumers. (Chapter 214 is reproduced in full in Appendix A to this brief

as it appears in the session laws in bill drafting form for ease in following the precise statutory changes.)

Section 1 of chapter 214 amended RCW 82.24-.040 so as to provide, so far as is here pertinent, that a wholesaler could sell cigarettes tax-free to the governing body of a recognized Indian tribe; but this permission to make tax-free sales would be revoked by the Department *if sales of such cigarettes were being made to persons who were not enrolled members of the tribe.* Section 2 further implements the policy embodied in section 1. It provides that cigarettes "intended for sale to qualified purchasers may be retained by * * * Indian tribal organizations, without affixing stamps required by this chapter." Who are these "qualified purchasers" to whom the Indian tribal organization may make sales of cigarettes tax free? Obviously, as is clear from section 1, they are tribal members who are purchasing cigarettes for their own consumption. In short, it is the clear policy of the State of Washington, embodied in chapter 214, that sales may be made, tax free, to tribal members so long as sales are not also made, tax free, to nontribal members. Thus, so far as the State is concerned, the fundamental question to which the brief of the United States addresses itself, i.e., sales to Indian consumers, is moot.

In summary: The one question on which the United States, in its brief *amicus curiae*, takes a

position is the very question on which, by reason of chapter 214, the State has no concern. The State has deliberately established a procedure whereby reservation Indians can purchase cigarettes for their own consumption tax-free, and has thereby deliberately decided not to become involved, legally or financially, with this question.

III

The Question of Sales of Cigarettes to Non-Indian Consumers Has Not Been Made Moot by Chapter 157, Laws of 1972, First Ex. Sess.

The State adheres to its position, expressed at page 3 of its original brief, that any issue as to the effect of the Colville Tobacco Ordinance (Appellant's Br. A-23 to A-28), passed on June 23, 1972, and any question as to the effect of chapter 157, Laws of 1972, Ex. Sess. (Appellant's Br. A-34 to A-41) are not properly before the Court. However, because the United States has suggested that the 1972 ordinance of the Colville Tribe and the 1972 act of the Washington state legislature may well have a bearing on the Court's disposition of this case, the State feels compelled to discuss them.

The suggestion of the United States that the Colville ordinance and the 1972 act may have rendered moot the issue of sales of cigarettes to non-Indians—the only issue in which the State is concerned, for the reasons previously discussed—rests upon a fundamental misconception as to the pur-

pose and effect of the 1972 amendatory act. The background of this act, and its basic purpose, are given in the Governor's message explaining his partial veto, reproduced at pp. A-41 to A-43, Appellant's Brief. As indicated therein, the purpose of the legislation was to strengthen the State's hand in collecting the state tax on cigarettes being transported for sale by Indians to non-Indians on those reservations over which the State had not assumed full jurisdiction pursuant to chapter 37.12 RCW. While strengthening the State's hand in enforcement against the seller, the act recognized the fact that enforcement against the purchaser-consumer was often impracticable, and specifically provided in § 7 that if a purchaser acquires cigarettes in an amount not exceeding two cartons, for his own consumption and use, the state would not look to him for payment of the tax. Such provisions exempting the purchaser-consumer of a minimum quantity of cigarettes are not uncommon in state cigarette tax laws. See New York Tax Law, Ch. 60, Art. 20, § 471-a; California Revenue & Taxation Code § 30106; Oregon Rev. Stat., § 323.060.

The 1972 act and these statutory provisions of New York, California and Oregon, are each recognition of a principle of tax administration supported by this Court in use tax collection cases such as *Scripto v. Carson*, 362 U.S. 207 (1960), i.e., the principle that in the field of excise taxes, it is often not feasible to collect the excise tax from the multi-

tude of ultimate consumers, but that the tax must be collected, as a practical matter, from the more limited number of vendors.

Note further that the 1972 amendatory act in no way purports to change the policy established by chapter 214, Laws of 1969, Ex. Sess. Rather, as pointed out in the Governor's veto message, the 1972 act actually builds upon the 1969 act.

Thus, the provision in § 2 of the 1969 act that cigarettes "intended for sale to qualified purchasers may be retained by * * * Indian tribal organizations, without affixing stamps required by this chapter" remains intact. But so, too, does the provision of the 1969 act which limits the term "qualified purchasers" to tribal members who purchase for their own consumption, rather than for resale to non-Indians.

It is apparently the contention of the United States that the phrase "qualified purchasers" has incorporated § 7 of the 1972 act so as to include any person who purchases, for his own consumption, no more than two cartons of cigarettes. But reading this provision of the 1972 act into the concept of "qualified purchasers" as that term is used in § 2 of the 1969 act, is to reverse completely the thrust of the 1972 act. The 1972 act was a tightening, not a loosening, of effective enforcement procedures.[1]

[1]It is an anomaly indeed that the 1972 act, which was vigorously opposed by representatives of those Indian tribes involved in cigarette sales to non-Indians in this state during its passage through the legislature, should now be construed by the United States and by the appellant as having opened wide the door for the very type of tax evasion which it was designed to prevent.

The difficulty with the United States' argument is attempting to interrelate two very different and independent exemptions. The exemption in § 2 is conditioned upon the status of two entities, i.e., the Indian consumer-purchaser on the reservation and the tribal seller. On the other hand, the exemption in § 7 pertains to any person, be he Indian or non-Indian, who acquires or possesses no more than two cartons of cigarettes for his own use, whether he purchases them in Oregon, on an Indian reservation or anywhere else. The § 2 exemption embodies a qualitative test. The § 7 exemption embodies a quantitative test. Each stands completely independent of the other.

The § 2 exemption does three things. It exempts the Indian purchaser irrespective of how many cartons he purchases, the retail transaction and the sellers, i.e., no tax is to be paid by anyone. Section 7, however, merely immunizes the purchaser from any tax liability. It, unlike the § 2 exemption, does not purport to immunize the seller or the transaction from the tax. Each exemption must stand on its own footing. When so construed, there is no basis for the suggestion of the United States that the enactment of § 7 of the 1972 act has a bearing on the question of sales by Indians to non-Indians on a reservation.

Moreover, even if the term "qualified purchasers" as used in § 2 of the 1969 act incorporates § 7 of the 1972 act, an examination of the terms of the 1972 act, in combination with an examina-

tion of the Colville tribal ordinance, shows that the ordinance is still in violation of state law and can hardly be characterized as "apparent cooperation" with state law. (Br. of United States 18) Sections 9, 10 and 11 of the ordinance (Appellant's Br. A-26) make it clear that the tribe acts as a wholesaler, selling to tribal members who act as retailers. Thus, the tribe is not selling to a "qualified purchaser" for it is selling to a retailer who is obviously purchasing for resale and not, in the language of § 7 of the 1972 act, "for purposes other than resale." Further, it is obvious that sales between the tribe and the individual Indian retailers will be in quantities vastly greater than two cartons.

Focusing next on the tax liability of the Indian retailer, as he sells to the non-Indian purchaser, it is clear that he has no tax immunity either. Again, the only tax immunity for Indian sellers is to be found in § 2 of the 1969 act. And this tax immunity extends solely to the Indian tribal organization itself.

In summary: the suggestion of the United States that the 1972 act has somehow rendered moot the question of sales to non-Indians rests upon a double misconstruction of Washington law. The suggestion misconstrues the relationship between the 1969 act and the 1972 act, insofar as it assumes that § 7 of the 1972 act expands the meaning of the term "qualified purchasers" as that term is used

in § 2 of the 1969 act. Further, even if the 1972 act does expand the meaning of the term "qualified purchasers," as used in § 2 of the 1969 act, there is still no statutory exemption conferred by § 2 of the 1969 act upon either the Colville Tribe, now acting as wholesaler, or upon Indian retailers such as the appellant, selling to non-Indian consumers.

CONCLUSION

With regard to the one question which the State considers of critical importance, i.e., the question of sales by Indians to non-Indians, the United States takes no position on the merits, but goes on to suggest that this Court need not reach them by reason of chapter 157, Laws of 1972, Ex. Sess. The State, on the other hand, suggests that a careful reading of chapter 157, together with a careful reading of chapter 214, Laws of 1969, Ex. Sess., and the Colville Tobacco Ordinance, demonstrates that the merits cannot be avoided. The issues remain very much alive.[2]

Respectfully submitted,

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[2]The basic issues remain alive not only with respect to the cigarette tax, but also with respect to the applicability of the retail sales tax, chapter 82.08 RCW. Although the briefs of the various parties and *amici curiae* have discussed primarily, if not exclusively, the question of the validity of the state cigarette tax, this Court's decision on the merits will also affect the validity of the retail sales tax as applied to sales of cigarettes on the Colville Reservation, a subject matter that is in no way connected with either the 1969 act or the 1972 act discussed above.

APPENDIX A

CHAPTER 214

[House Bill No. 362]

TAX ON CIGARETTES

AN ACT Relating to revenue and taxation; amending section 82.24.040, chapter 15, Laws of 1961 and RCW 82.24.040; and amending section 82.24.050, chapter 15, Laws of 1961 and RCW 82.24.050.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 82.24.040, chapter 15, Laws of 1961 and RCW 82.24.040 are each amended to read as follows:

Every wholesaler in this state shall ((immediately)), *within a reasonable time* after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: PROVIDED, That any wholesaler ((engaged-in-interstate-business,)) who furnishes surety bond in ((the)) *a* sum satisfactory to the ((commission)) *department*, shall be permitted to set aside, *without affixing the stamps required by this chapter*, such part of his stock as may be necessary for the conduct of ((such interstate)) *his* business ((without affixing the stamps required by this chapter)) *in making sales to persons in another state or for-*

eign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such ((interstate)) *unstamped* stock shall be kept separate and apart from stamped stock: PROVIDED FURTHER, That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, *or to a federal instrumentality, or to an Indian tribal organization,* make a true duplicate invoice of the same which shall show full and complete details of the ((interstate)) sale or delivery, *whether or not stamps were affixed thereto,* and shall transmit such true duplicate invoice to the main office of the ((commission)) *department,* at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this ((proviso)) *section* the ((commission)) *department* may revoke the permission granted to the taxpayer to maintain ((an interstate)) *a* stock of goods to which the stamps required by this chapter have not been affixed. *The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place; or have taken place, within the exterior boundaries of the reservation occupied by that tribe.*

Sec. 2. Section 82.24.050, chapter 15, Laws of 1961 and RCW 82.24.050 are each amended to read as follows:

Every retailer shall, ((except as to those articles on which the tax has been paid by the proper affixing of stamps by a wholesaler, as herein provided, affix the stamps for)) *within a reasonable time after receipt of any of the articles taxed herein, cause the same to have* the *requisite* denomination and amount ((necessary)) *of stamps affixed* to represent the tax ((on each individual package or container, the same to be done, in all cases, immediately upon receipt by the retailer of the unstamped articles)) *imposed herein:* PROVIDED, That ((any retailer engaged in interstate business, who furnishes surety bond in a sum satisfactory to the commission, shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business)) *those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations,* with affixing the stamps required by this chapter. ((Such interstate stock shall be kept separate and apart from stamped stock: PROVIDED FURTHER, That every retailer shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, make a true duplicate invoice of the same which shall show

full and complete details of the interstate sale or delivery, and shall transmit said true duplicate invoice to the main office of the commission, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this proviso the commission may revoke the permission granted to the taxpayer to maintain an interstate stock of goods to which the stamps required by this chapter have not been affixed.))

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

MOTION FOR ORDER REQUIRING BRIEFS UPON THE ISSUE OF JURISDICTION

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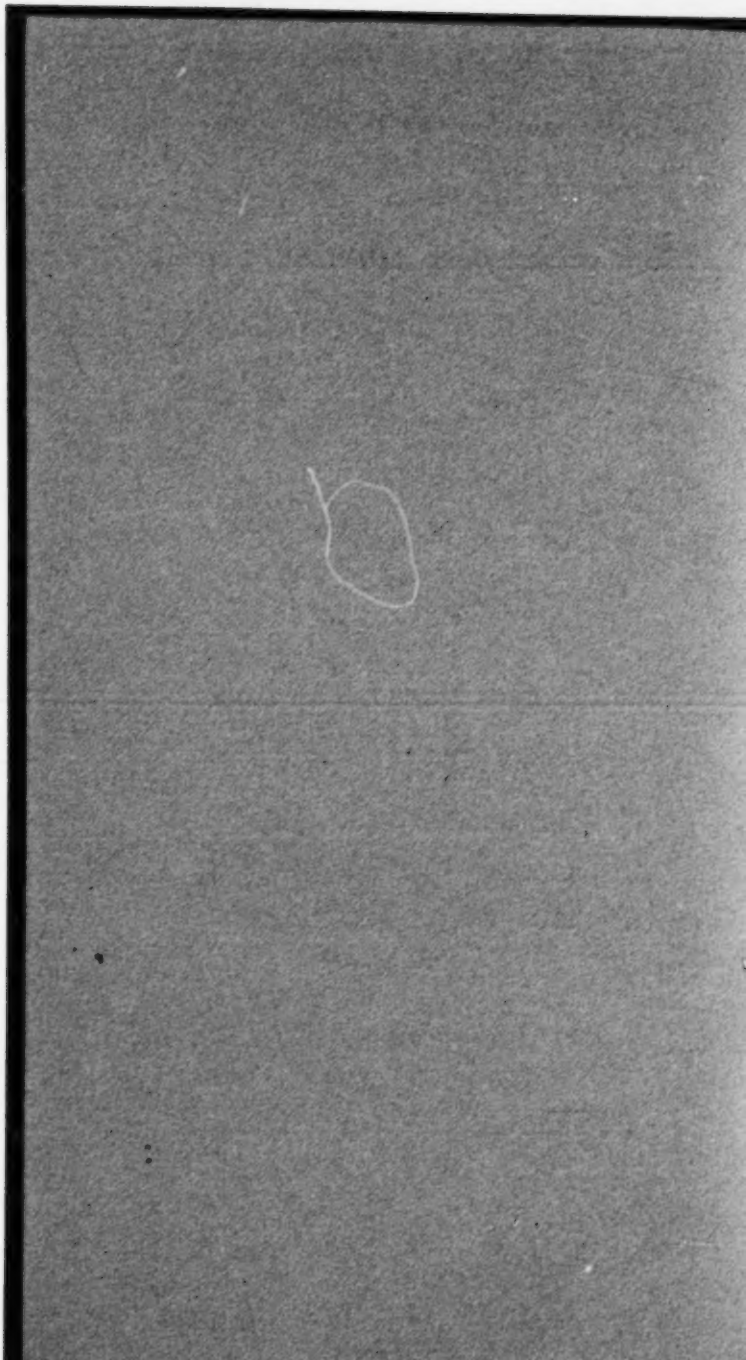

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Counsel for the seven Amici Indian Tribes and counsel r the National Congress of American Indians have raised their briefs the serious jurisdictional question of whether e State of Washington has ever validly assumed Indian risdiction under the express terms of Public Law 83-280.

Since that question was not raised by appellant's former unsel in the trial court, counsel for appellant felt him-lf precluded by familiar principles of appellate law from ising it in the Supreme Court. However, at the time of al argument in this case, on December 12, 1972, three stices of the Supreme Court questioned appellant's coun-l upon the point. Because of the Supreme Court's justi-

fied interest in this very serious question and especially in light of the newly-discovered legislative history of Public Law 83-280, it is both appropriate and necessary to the Supreme Court's decision in this matter that an order be issued requiring the parties to submit additional briefs upon the issue of jurisdiction.

Despite the clear language of its Enabling Act and Constitution, both precluding the State of Washington from Indian jurisdiction without the consent of Congress and of "the people" of the state, Washington failed to follow the express mandate of Congress in Section 6 of Public Law 83-280, which specifically requires amendment of the state constitution prerequisite to assumption of Indian jurisdiction. Instead, Washington proceeded to assume Indian jurisdiction by simple legislative enactment. The Washington Court attempted to validate the legislative assumption of Indian jurisdiction upon the basis of an equation that "consent of the legislature is consent of the people. "*Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), appeal dismissed, 397 U.S. 16 (1970). The 9th Circuit Court of Appeals ruled in the same manner in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (1966), *cert. den.*, 387 U.S. 907 (1967).

But neither the Washington Court nor the 9th Circuit Court of Appeals had the benefit of consideration of the newly-discovered legislative history of Public Law 83-280 or the Supreme Court's decision in *Kennerly v. District Court of 9th Judicial District of Montana*, 400 U.S. 423 (1971).

In *Kennerly*, the Supreme Court refused to uphold the Supreme Court of Montana which ruled that Montana had

validly taken jurisdiction over the Blackfeet Reservation. The Supreme Court held that strict compliance with the provisions of Public Law 83-280 is required and pointed out that:

> "The statute is illustrative of the *detailed regulatory scrutiny* which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country." (Emphasis Supplied) 400 U.S. at 424, n. 1.

The Supreme Court further pointed out that Congress' specific provisions governing state assumption of Indian jurisdiction was no "idle choice of words", 400 U.S. at 427.

The newly-discovered legislative history of Public Law 83-280, demonstrates that the interpretation of Public Law 83-280 by the Washington Court and the 9th Circuit Court of Appeals is clearly invalid. In the Hearing on HR 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Congress 1st Sess. (June 29, 1953), Congressmen from states with large Indian populations discussed with Mr. Harry Sellery, Chief Counsel, Bureau of Indian Affairs, and Mr. William R. Benge, Chief, Branch of Law and Order, Bureau of Indian Affairs, the manner in which the various states would be able to assume Indian jurisdiction under the proposed Public Law 83-280.

In referring to those states with constitutional prohibitions against Indian jurisdiction (namely, Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington), Mr. Benge pointed out to the Subcommittee that Section 6 of the proposed Public Law 83-280 would require amendment to the state con-

stitutions and that the act was framed both as an amendment to the enabling acts of the states and as authority by Congress for the states to amend their constitutions. Subcommittee Report, p. 23, ll. 16-25, p. 24, ll. 1-2.

Congress' understanding of the need for constitutional amendments for those states was succintly and precisely stated by Congressman Wayne Aspinall as follows:

> "Mr. Aspinall. The State Legislature would not do it. The people of the state themselves would have to do it." Subcommittee Report, p. 24, ll. 3-4

Again, in the Hearing on HR 1063 Before the Committee on Interior and Insular Affairs, House of Representatives, 83rd Congress, 1st Sess. (June 15, 1953), Mr. Abbott, Counsel to the Committee who had participated in the earlier Subcommittee Hearing, reported to the Committee that:

> "The bill does not as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling act for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and *Washington* provided that exclusive Federal jurisdiction would be retained." (Emphasis Supplied) Committee Report, p. 2, ll. 22-25, p. 3, ll. 1-3.

Mr. Abbott then reported:

> "The two additional section amendments would apply first [Section 6] to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.
>
> "The other amendment [Section 7] would apply to any other Indian states, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction." Committee Report, p. 4, ll. 6-14.

Thus it is beyond question that Section 7 of Public Law 83-280 authorized *only* those 15 or 18 states without organic law impediments to assume Indian jurisdiction by simple legislative enactment. But Section 6 of Public Law 83-280 which applied to the eight states with organic law impediments is more complicated. It authorized the eight states to amend where necessary their "state constitutions or existing statutes" prerequisite to assumption of Indian jurisdiction. The second half of that disjunctive proviso ("constitution or existing statutes") applied *only* to South Dakota and North Dakota whose constitutions require simple legislative enactment prerequisite to assumption of Indian jurisdiction. But the first half necessarily applied to Arizona, Montana, New Mexico, Oklahoma, Utah and *Washington* and *required* constitutional amendment. Consequently, Washington could not assume Indian jurisdiction by legislative enactment alone.

Congress' intent with respect to Washington is made clearer by the following testimony of Mr. Abbott:

> "At any other time in the future that the state of Washington or South Dakota is able to remove their constitutional impediments, then they could so do it." Committee Report, p. 7, ll. 20-22.

Finally, any remaining doubt disappears with the testimony of Congressman Alfred J. Westland of Washington who testified:

> "Mr. Westland. I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, *but they do have a constitution there that requires this amendment in order that they can get at it.*" (Emphasis Supplied). Committee Report, p. 8, ll. 4-9.

But Washington did not amend its state constitution to assume Indian jurisdiction as required by the "detailed regulatory scrutiny" of Congress in Section 6 of Public Law 83-280. The result is that Washington has no valid jurisdiction over appellant upon which to predicate taxation of his business activities on the Colville Indian Reservation.

For these very important reasons, appellant moves that the Supreme Court issue an order requiring the parties to submit additional briefs upon the issue of jurisdiction.

Respectfully submitted,

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ROBERT L. PIRTLE
Counsel for Appellant

December 20, 1972

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1031

Leonard Tonasket, Appellant, v. Washington et al.	On Appeal from the Supreme Court of Washington.

[April 24, 1973]

PER CURIAM.

The judgment of the Supreme Court of Washington is vacated, and the case is remanded to that Court for reconsideration in light of §§ 6 and 7 of c. 157, 1972 Session Laws of the State of Washington, and this Court's decision in *McClanahan* v. *Arizona State Tax Comm'n*, No. 71-834 (March 27, 1973).